RESIDENTIAL TENANCY LAW AND PRACTICE IN TASMANIA

by

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This thesis contains no material which has been accepted for the award of any other higher degree or graduate diploma in any tertiary institution and that, to the best of my knowledge and belief, the thesis contains no material previously published or written by another person, except when due reference is made in the text of the thesis.

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ABSTRACT

One of the major findings of the Australian Government Commission of Inquiry into Poverty (1975) was, that in the area of residential tenancies, the body of landlord tenant law throughout Australia afforded very little protection to the tenant.

During the late 1970's a number of Australian states commenced the process of introducing reforms for the purpose of regulating the legal relationship between landlord and tenant. As a result of that program, the last decade has seen all Australian states (except Tasmania) introduce new residential tenancies legislation. The variety of responses has included the introduction of new codes, which set out in statutory form, the rights and duties of the parties during the tenancy agreement, and the establishment (in some States) of new specialist tribunals to hear disputes between parties to a tenancy contract.

The purpose of this thesis is to evaluate the practical and legal effect of the current body of landlord tenant law in Tasmania. The thesis considers the Residential Tenancies Acts in other Australian states, and makes a number of recommendations concerning desirable changes to the law in Tasmania.

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INTRODUCTION

1.0 The Private Rental Sector in Tasmania

Residential tenancies law has impact on the lives of many Tasmanians. In the last census year (1986), 96,128 people were living in rented accommodation. Of these, 37,260 people were living in housing authority dwellings, 6,381 in other government dwellings and 52,477 were resident in privately rented accommodation.

Table 1 presents a breakdown of the number of persons resident in different forms of housing tenure for the last three census years.

TABLE I - Nature of Occupancy by Persons (Tas)

	Census Years					
	1976	%	1981	%	1986	%
Owned	107,450	(27.7)	118,391	(29.3)	147,807	(35.1)
Being purchased	165,273	(42.7)	159,421	(39.5)	161,824	(38.4)
Owner/purchaser (undefined)	1,159	(0.3)	9,021	(2.3)	-	-
Rented: Housing authority	23,094	(6.0)	31,848	(7.9)	37,260	(8.8)
Other government agency	65,687	(17.0)	62,971	(15.6)	6,381	(1.5)
Private	(part of above fig.)		(part of above fig.)		52,477	(12.5)
Other and not stated	(part of above fig.)		(part of above fig.)		(part of above fig.)	
Other and not stated	24,513	(6.3)	21,755	(5.4)	15,614	(3.7)
Total state population	387,176	(100)	403,407	(100)	421,363	(100)

Source: A.B.S. Census Data

Detailed tables recording the changing pattern of housing tenure in Tasmania from 1921 - 1986 are contained at Appendix 5 (in both statistical and percentage form). It is significant to note from these tables that the number of privately rented dwellings has consistently remained around 20,000 since 1954. In 1954 there were 19,128 privately rented dwellings, and in 1986 there were 22,359 privately rented dwellings (excluding non housing authority government tenancies). One of the major changes in the distribution of housing tenures has been the establishment of a public housing sector in 1945. In the census year 1954, there were 2,871 housing authority tenancies (representing 4.06% of the total number of households), and in 1986, there were 12,213 housing authority tenancies (representing 8.2% of the total number of households).

These statistical tables are of interest because both of the Federal and State government focus in housing policy on the promotion of home ownership. Since the government's earliest involvement in the area of housing in the early 1900's, many home ownership schemes have been introduced, including, direct grants (home deposit assistance scheme), regulation of housing loan interest rates, tax rebates and mortgage relief schemes. Additionally, indirect benefits have accrued to home buyers and owners through the non taxation of capital gains on private dwellings, and the non taxation of imputed rent income.

The fact that such tenure specific assistance has been provided towards home ownership, through explicit and implicit subsidies by both Labor and Liberal governments, suggests fairly strongly held beliefs in the ideology of home ownership. Households occupying each of the major forms of tenure receive some type of assistance - but it is not assistance of equal value. The fact that financial assistance is generally tenure specific (rather than tenure neutral in objectives) is partially explicable in terms of the government's desire to foster home ownership. In 1986 Australia had one of the highest home ownership rates in the western world, with 71.1% of Tasmanians either owning or purchasing their own home. (See Appendix 5).

Despite the governments focus on home ownership, it seems that a significant minority of households will continue to be dependent on the rental sector as the only means of housing available to them. The relationship between housing tenure and income is set out in Table II.

TABLE I I - Nature of Occupancy - Weekly Household Income - Number of Households (Tas)

	Nature of Occupancy (Household)			
Weekly Household Income	Owned	Being Purchased	Private Rental	Housing Department Tenancies
$10 - $172	10,628 (18.3%)	1,793 (3.86%)	4,301 (18.4%)	4,082 (33.4%)
$173 - $287	13,522 (23.3%)	4,649 (9.8%)	4,381 (18.8%)	3,274 (26.8%)
$288 - $421	8,760 (15.1%)	9,303 (19.6%)	4,691 (20.0%)	1,842 (15.1%)
$422 - $613	8,461 (14.5%)	11,675 (24.5%)	4,186 (17.9%)	1,130 (9.3%)
$614 - $766	4,300 (7.4%)	6,710 (14.1%)	2,023 (8.7%)	360 (2.9%)
$767 +	6,863 (11.8%)	8,578 (18.0%)	1,997 (8.6%)	253 (2.1%)
Not stated	4,480 (7.7%)	3,718 (7.8%)	1,452 (6.2%)	1,118 (9.2%)
Absent spouse(s)	1,139 (1.9%)	1,157 (2.4%)	124 (1.4%)	151 (1.2%)
TOTAL	58,153 (100%)	47,583 (100%)	23,355 (100%)	12,210 (100%)

Note 1: Private rental figures exclude 2,160 dwellings rented by other government agencies.

Note 2: Differences will be observed when comparing the totals in Table II (above) and Table I at Appendix 5. The marginal differences arise, because of a random adjustment in non-zero cells in the source material. It is the practice of the Australian Bureau of Statistics to make such an adjustment to avoid the release of confidential data.

[Source: Micrographics Bureau (39). 1986 Census of Population and Housing, for the state of Tas. A.B.S.]

Several observations can be made from the table:

(i) The private rental sector consists predominantly of lower income earners.

(ii) Only an extremely small percentage (3.8%) of those purchasing have a household income less than $172.00 per week.

This would appear to suggest that the option of home ownership (to those who do not already own a home) is extremely limited to low income earners (particularly those on pensions and benefits). Most tenants live in the private rental sector by necessity rather than by choice. Although statistically, in percentage terms the number of privately rented households has been declining relative to other tenure forms (see Table II Appendix 5), it is likely that a significant proportion of Tasmanians will continue to be dependent on the private rental sector to meet their housing needs.

1.1 The Substance of this Report

Chapter 1 provides an historical overview of the development of relevant statute law in Tasmania from the first landlord and tenant statute in 1874, until the present time (1989). It was thought important to provide such an account for two reasons. First, to draw together the various Acts into a concise historical record, and second, from this history to develop some insight into the role taken by the Tasmanian legislature since the turn of the century. In examining this history it seems (war time rent regulations statutes excluded), that the legislature has confined its intervention basically to the task of consolidating existing statutes, and to regulating the most oppressive aspects of the "self help" measures. The second part of Chapter 1 reviews the history of rent control legislation in Tasmania. It traces the impetus for the legislation from the beginning of World War II, until its expiry in 1963, following a period of consistent pressure for de-control commencing in 1954.

The second chapter deals with the application of contractual principles to tenancy agreements. It examines the application of contractual doctrines such as the duty to mitigate damage and the doctrine of frustration, in so far as they have been applied by the courts to residential tenancy agreements. These developments are important to the current Tasmanian law, because the inter-relationship between contractual and proprietary principles has not been codified to any extent as in other Australian jurisdictions.

The third chapter outlines the common law and statue law governing the landlord tenant relationship at the present time, and discusses the major weaknesses in the current body of law.

Chapter Four presents a summary of the results of field research interviews with tenants (administered individually and through a number of housing organisations). Such research was conducted primarily because of the absence of any recent and relevant survey work relating to the problems of tenancy in the private rental sector in Tasmania. At the time of writing this report 60 forms have been completed and collated, and due to the small sample size, a major limitation is placed on any statistical inference which may be drawn from the research. It is intended that the research process will continue after completion of this report, and that a report based on a significantly larger sample (n = 150), will be presented to the government to act as an impetus for law reform.

Chapter Five provides an overview of the reform process in Tasmania from the release of the Law Reform Commission Report in 1978 to the current time. Some attention is given in this chapter to reviewing the results of studies into the effect of the introduction of the Residential Tenancies Acts on the supply of rental housing. It was thought important to comment on this research, as it expected that during any reform process, those opposed to the legislation will propagate the view that investor

confidence will be undermined by legislation and in consequence the likely result will be a diminution in construction and purchase of rental housing stock. Reform of residential tenancies law in 1990 is likely to be a socially and politically divisive issue.

The sixth chapter presents a summary of reforms in other Australian states. These reforms substantially abolish the common law rules on landlord and tenant law, and establish codes regulating a relationship between the parties. Under these codes (except where contracting out is permitted), the Acts make the rights of landlords and tenants dependent on the terms of the legislation, rather than express agreement made between the parties. One limitation in condensing the analysis of a number of complex and comprehensive rental housing codes into a single chapter of this report, is that some significant aspects of the new rental codes may have been omitted or received scant attention. In researching this chapter it became apparent that the task of constructing workable legal and administrative solutions out of generalised recommendations concerning reform, is an extremely difficult one. In some areas the prima facie intention of anti-discrimination provisions (as for example in the original drafting of the S.A. legislation) has not worked well in practice. The findings of the recent Victorian Review (1989) into the operation of the Residential Tenancies Tribunal, also raise the difficult question of whether the establishment of such specialist tribunals has in practice worked as well as it might in its overall accessibility to tenants.

Whether legislation works well in practice, is as much dependent on the quality of the administrative machinery which supports it, as it is on the actual statements of legal rights and obligations contained in the legislation.

Key factors in the success of a new residential tenancies Act in Tasmania will be:

(i) The design of an efficient and workable legislative procedures, which can ensure that repairs and other common problems are resolved within a reasonable time frame.

(ii) Decisions concerning "onus over action", (ie which party bears the responsibility for initiating and maintaining the action where there is a breach of the Act).

(iii) Adequacy in the provision of financial and personnel resources of the administrative and dispute settling machinery.

The final chapter draws together a number of recommendations derived from the contents of this thesis.

CHAPTER 1

AN HISTORICAL INTRODUCTION TO THE TASMANIAN LEGISLATION

1.1 Landlord and Tenant Legislation

Until the 1935 consolidation[1], the law governing residential tenancies in Tasmania was partially embodied in a number of Statutes, dating back to the reign of Henry VIII. The earliest Statute on record of general application is the *Landlord and Tenant Act, 1874*,[2] which dealt predominantly with the remedy of distress[3], and empowered a sheriff by Writ of Execution to seize growing crops in situations where the tenants goods or chattels were insufficient to meet the amount of accrued rental owing on the tenancy. Until the passing of this Act, goods belonging to subtenants and lodgers were also liable to seizure in situations where the superior tenant had defaulted on rent payments. The 1874 Act exempted the lodger's and subtenant's goods from distress, and provided that in the event of seizure, or threats of seizure, the lodger or subtenant could serve notice on the bailiff that the superior tenant had no interest in the goods.

The sections dealing with distress appear to have been modelled on the *Lodgers Goods Protection Act* passed by the British Parliament in 1871, despite opposition from some influential quarters when the bill was first introduced in 1869. The practice of seizing lodgers goods, although unjust, was widely practiced in Victorian England, and concern was expressed that the landlord's security for rent would be undermined by any regulation of the remedy so as to exclude lodgers' goods. In addition there were expressed fears that the bill would encourage collusive arrangements between tenant and lodger so as to avoid proper application of the remedy.[4]

In 1901 the Tasmanian Parliament enacted the *Recovery of Possession of Tenements Act*[5] which provided for a more speedy and effectual recovery of property, unlawfully held over at the termination of the tenancy. The method was by way of warrant issued to Police Constables who were empowered to break and enter, by force if needed, and who could call on assistance from the landlord or any other available person.[6] An ejectment could not however be made before 9.00 a.m. or after 4.00 p.m.[7] The Act was amended in 1921[8] to enable certain complaints to be heard by Police Magistrates where the annual rental exceeded £40 a year, and this amendment was included in the 1935 consolidation.

The relatively unqualified doctrine of distress contained in the *Landlord and Tenant Act (1874)* was amended in 1909[9] to exclude certain goods, such as those belonging to the spouse of the tenant or third parties, and goods comprised in a hire purchase agreement or bill of sale.[10] The Act also exempted necessary furniture and weaving apparel of the tenants family to a value not exceeding ten pounds, as well as any sewing or knitting machine, typewriter or mangle belonging to a female member of the household.[11] A summary form of redress against unlawful distress was also introduced in the 1909 Act.[12]

In 1927 the Act was further amended to introduce a priority claim system in respect of seized goods which were comprised in a hire purchase agreement.[13] The objective appears to have been to allow a landlord to remedy distress against the tenants equity in the goods under hire purchase, once such goods had been sold, and the trader had claimed his or her interest. The Bill was the subject of considerable parliamentary debate.[14] At issue, was the extent to which parliament should protect the traders interest in goods comprised under a hire purchase agreement which had been distrained by the landlord. Until the 1927 Act, although goods under hire purchase were exempt from distress, the onus was still on the tenant following seizure, to deliver to the officer levying distress a schedule of goods, in respect of

which he claimed exemption. If the tenant failed to do this, then the landlord was able to seize the goods, irrespective of ownership and sell them at whatever price he/she determined. In introducing the Bill the Attorney General (A.G. Ogilvie) said that it had been at the request of a very reputable section of the community, and was aimed to prevent unscrupulous landlords and tenants from combining to defeat the owners of goods sold on the hire purchase system.[14] It was the reputability of the commercial trader however, and the desirability of eliminating the traders risk in encouraging people to buy goods on credit, that was really at issue. In the words of several parliamentarians:

> "The position in Tasmania today should not be encouraged by Parliament. Travellers visit country districts and by their persuasiveness are able to prevail on the people. Many of these travellers are a curse to the country, and I am not going to vote for their protection. They are selling gramaphones and wireless sets to people who cannot afford them, and are forcing people into these transactions."[15]

> "There are firms from the mainland dodging taxes and sending their men over here and selling wares very often to the women of the house while the man is at work."[16]

Although parliament did not generally feel inclined to grant protection to "such a class of men", there was general concern over the principle which enabled a landlord to sell someone else's goods acquired during a distress. A compromise was agreed which enabled the landlord to distrain only on that portion paid by the tenant, and a system was established in respect of seized goods enabling the trader to make first claim on the amount of his unpaid purchase money, the landlord a second claim, and the remainder (if any), could be returned to the tenant.

There were no further amendments to the 1874 Act, or any further legislation until the *Landlord and Tenant Act (1935)*,[17] which still governs aspects of the law applicable in Tasmania in 1990. There have been no amendments to this Act since 1935.

Interestingly enough, when it was introduced in 1935 by the Premier A.G. Ogilvie, it was seen largely as an uncontentious matter, and passed quickly through both Houses of Parliament without discussion or amendment.[18] It was intended that the 1935 Act should consolidate all the existing statute law on the subject,[19] embodying the existing Tasmanian statutes relating to distress and replevins,[20] and recovery of tenements, as well as the effective English legislation applicable in Tasmania at the time. The consolidation of relevant imperial Acts was based on work prepared by Sir Leo Cussen for the Victorian Parliament.[21]

The major provisions of the 1935 Act are worth discussing in more detail, because they form part of the current law. The major parts of the Act concern:-

* Leases and rents.
* Provisions as to execution and seizure by third parties.
* Emblements and fixtures.
* Distress for rent.

* Leases and Rents: Provision is made under this part to apply a penalty to any tenant (for any term of life, lives or years), to pay double rent, in the event of holding over at the determination of the tenancy. Equitable relief from such a penalty is proscribed.[22]

* Execution and Seizure by Third Parties: Restrictions are placed on third parties seizing tenant goods in lieu of unpaid debts, from taking goods on leased premises until the arrears of rent not exceeding one year is paid to the landlord. Other sections exclude certain goods (mainly agricultural crops), from third party seizure and require the landlord to be advised of the execution of any seizure involving tenant chattels.[23]

* Emblements and Fixtures: A tenant may remove any buildings or fixtures erected by him during the tenancy, with the landlords consent. The landlord nevertheless may elect to purchase the fixtures. Should he or she wish to do so, there is provision for the value to be ascertained and determined by two referees.[24]

* Distress for Rent: The distress provisions comprise the major form of the 1935 Act. The Act specifically endorses the lawfulness of impounding and selling goods in lieu of unpaid rent,[25] and regulates aspects of the distress remedy, including details of what may be seized and what ought to be exempted. Section 29 is one provision illustrative of the legalistic and difficult language of the Act, the oppressive nature of the distress remedy, and the general inapplicability of the majority of its provisions to the modern residential urban tenancy:

> "Every person having rent in arrear and due upon any demise lease or contract may seize and secure any sheaves and cocks of corn or corn loose or in the straw or hay lying or being in any barn or granary or upon any hovel stack or rick or otherwise upon any part of the land or ground charged with such rent; and may lock up or detain the same in the place where the same is found for or in the nature of a distress until the same is replevied upon security given as hereinafter provided; and in default of replevying the same within the time hereinafter provided, may sell the same, so as nevertheless such corn, grain, or hay so distrained as aforesaid is not removed by the person distraining to the damage of the owner thereof out of the place where the same is found and seized but is kept there (as impounded) until the same is replevied or sold."

Subsequent sections empower the landlord to distrain "cattle or stock feeding upon the premises", "corn, grass, hops, roots, fruits or pulse", and "beasts of plough, cattle and sheep" (as a last resort, if other distress is insufficient).[26]

Limited exceptions are provided under the Act for tools of trade, necessary wearing apparel, tables, chairs, cooking utensils, beds and bedding for the family, to a value not exceeding £20. There is also an exception for one sewing machine, knitting machine, typewriter or mangle belonging to any female member of the household.[27]

The legislation also empowers a landlord to make a second seizure if sufficient distress is not found in the first raid.[28] It an offence for a tenant to attempt to protect goods from seizure by storing them elsewhere, and a double penalty (i.e. twice the value of the goods) is impressed for fraudulent removal.[29] Persons suspected of storing such "fraudulently or clandestinely conveyed goods" can be subject to lawful raids by the landlord. Under the legislation the landlord may call on the assistance of a police officer to break open and enter a dwelling house, barn, stable or outhouse, where such goods or chattels are suspected by the landlord to be hidden. Penalties for fraudulent removal by the tenant (a pound-breach) and assisting third parties amount to double the value of the goods removed.[30]

The only minor alteration to existing law contained in the 1935 Act was that the tenant could within 7 days request an appraisement of the seized goods,[31] but appraisement was not a necessary step prior to any sale by the landlord.

Attached to the 1935 Act, in the second schedule, is a model agreement containing 12 covenants. 11 of these concern obligations imposed on the lessee to pay rent, pay taxes, repair (substantial repairs included), paint outside every "X" years with 2 coats of proper oil colours, paint inside every "X" years with 2 coats of proper oil colours in a workmanlike manner, insure from fire and to rebuild in the case of fire, and to allow the lessor to view the state of the repair and to attend to any "wants of reparation" within 3 months, agree not to use the premises as a shop or business place, or assign and underlet without leave, to leave the premises in a state of good repair, and to allow for re-entry by the lessor should rent be in arrears for 15 days.

The only obligation on the lessor in consideration of the above, was "to allow the lessee to peaceably possess and enjoy the demised premises without interruption or disturbance".

From 1935 to the present time there have been no major modifications to the substantive law. Two pieces of legislation, the *Substandard Housing Control Act, 1973*, which aims to improve the quality of housing stock and the *Court of Requests (Small Claims Division) Act, 1984*, which establishes a forum for the resolution of small claims, have provided some measure of redress for aggrieved tenants with poor housing conditions, and for tenants seeking resolution over non-return of their security deposit.

1.2 Rent Control Legislation

Tasmania has had a lengthy and interesting history of rent control commencing at the beginning of World War II, and continuing to the mid 1960's.

The earliest attempt in Tasmania to regulate rentals in relation to residential dwellings however, occurred in the early 1920's. In 1920 Parliament established a select committee to consider and report upon a proposed "Fair Rents Bill".[32] The committee took evidence over 5 days from landlords and tenants and recommended introduction of legislation to regulate rent, so that "owners should not unduly exploit tenants". The bill was introduced at a time when practically no homes were being built for rental, and the average rental being paid by tenants was around two pounds (half of weekly earnings). The bill proposed to establish a Fair Rents Court presided over by the Police Magistrate. It also provided a means by which the capital value of the dwelling could be arrived at in fixing a fair rental, and made it unlawful to give or receive a bonus or premium for the lease of a house (penalty: fifty pounds). The bill however was rejected by a substantially conservative Upper House (15:1 against),

who argued that such measures would only "increase the disinclination of investors to put their money into house property".[33]

It was not until nearly 20 years later that the issue of rent control was discussed again by the Tasmanian Parliament. In December 1939 the *Increase of Rent (War Restrictions) Act 1939* was enacted by the Tasmanian Parliament following a joint meeting of Commonwealth and State Ministers which dealt with the issue of war time controls on prices and resources. It was resolved that the States would either enact their own rent control legislation, or operate under that Commonwealth law made pursuant to its defence powers.[34] The Act aimed to restrict increases in the rent of dwelling houses and shops during the war years, and to authorise the setting up of Fair Rents Boards for the purposes of determining fair rents, on application of lessor or lessee. The legislation effectively froze rents as at the 31st of August, 1939 (S.4), prohibited any contracting out arrangement between the parties (S.12), and provided machinery to enable either party to apply to the Fair Rents Board for a determination to vary the rent. It also made the offering or receiving of a bonus in consideration of making a lease, unlawful (S.14). Penalties for any breach of the Act were quite severe, (£100). Three such regional Boards were established in Tasmania,[35] and between 1 December 1939 and 26 March 1942, dealt with 179 applications.[36]

It was intended that the Act should continue in operation for the duration of the war, and for a further 6 months. In March 1948, concern was expressed in the Tasmanian Parliament that should the *National Security Act* lapse, there would be no legislative authority to continue rent control in the State.[37] In July 1948, temporary legislation[38] for the control of rents and evictions (essentially re-enacting the Landlord and Tenant Regulations) was introduced for the purpose of transferring legislative responsibility from the Commonwealth to the State. Further legislation[39] was introduced in December of the same year, extending the expiry date until 1949, when the Increase of *Rent (War Restrictions Act)* was repealed. The Fair Rents

Boards were however reconstituted under the *Landlord and Tenant Act, 1949*, and saving and transitory provisions under the Act authorised the continuation of war time determinations.[40]

In a number of respects the 1949 Act was a very advanced piece of legislation, incorporating many of the reform proposals currently being advocated by tenant interest groups.

In summary the Act, which was binding on the Crown:[41]

1) Appointed a rent controller and a number of inspectors (S.9);
2) Detailed matters to be taken into account in determining fair rents (such as comparable rents, capital value of the premises, rate of interest on the overdraft etc.), and included amongst these a consideration of hardship which either party might incur if the rent were to be reduced or increased (S.18);
3) Prohibited key money (S.32);
4) Made refusal to let a dwelling house on the grounds that children should live in it, unlawful (S.34), and, furthermore make it unlawful to enquire as to whether a prospective tenant had children (S.34);
5) Required any person receiving rent to provide a full receipt (S.48);
6) Provided for continuing tenancy by prohibiting eviction, except in accordance with some 15 prescribed contingencies laid down in the Act (S.52). It was a requirement that any Notice to Quit should specify the grounds and particulars of the eviction (S.56). In any action for the recovery of possession, it was necessary that the Court should take into consideration the hardship of both parties (S.60). In addition, the period of notice required increased proportionally with the length of occupancy, to a maximum of 30 days (S.53). The Act also provided a 6 months security of tenure following any determination made by the Fair Rents Board (S.54);

7) Removed the distress remedy (S.77);

8) Endorsed the covenant for quiet enjoyment (S.69);

9) Prohibited contracting out (S.78, S.79).

Although the 1949 Act was a most complex piece of legislation, it was initially intended that the Act would expire on the 30th of June, 1950, a year after its introduction.[42] The operation of the Act was extended to October, 1950 and a further series of annual amendments extended its operation to April, 1954.[43]

In early 1954, a select committee of the legislative council was appointed to examine the 1949 Act. Evidence covered a wide range of matters, but the main focus was in establishing whether the system of controlled rentals should continue. The committee expressed its concern that the system was one of the contributing factors to housing shortages and deterioration of the quality of housing.

> "We emphasis the gravity of the situation from a health point of view and think it calls for immediate attention of the Government. The present system is creating fresh slums in the older portions of our cities with all this social evils which flow from such conditions"[44]
>
> "We think it also sufficiently obvious that the existence of controls as to rent and eviction of undesirable tenants would itself be sufficient to divert the investment of capital to other directions."[45]

Although the committee was strongly in favour of deregulation, it declined however to recommend immediate de-control because of flow-on implications affecting wage levels.[46] It proposed however a series of measures for progressive de-control, commencing with newly let houses and business premises. The recommendations were adopted by Parliament in April, 1954.[47] The restraint on evictions contained in the 1949 Act was also amended to allow eviction without specified cause, subject to a minimum 6 month period of notice (S.9), and to consideration of the lessee's

hardship (S.10). The latter qualification was not contained in the original bill, but after substantial debate on an amendment to extend an 18 month hardship period, agreement was reached enabling a tenant a further 6 months before eviction, if the tenant could prove hardship.[48] For the first time, the 1954 Act set out clearly defined circumstances in which it was permissible for the landlord or agent to enter the property during the tenancy. Inspection was limited to 4 times per annum, subject to 7 days written notice (S.13). A sunset clause limited the operation of the Act to the 31st of December, 1955.

In 1956 the Labor Government, (against strong opposition) introduced a Fair Rents Bill, which was intended to peg rents as at 30th of June, 1956 and establish a Fair Rents Board. (Comprising a Magistrate, Real Estate representative and tenant representative). The Bill also gave the Board power to postpone the period of eviction for up to a year. A conservative opposition in the House of Assembly and Upper House were sharply critical of the Bill, which they argued would only help perpetuate housing shortage, by discouraging the building of houses.[50] The Bill was substantially amended in the Legislative Council[51] during the second reading, to eliminate the pegging of rents, and reducing the time in which a warrant of execution could be carried out from 6 to 3 months. A conference of the two houses reached agreement on a modified Act which appointed a single arbitrator (a Police Magistrate), and gave the arbitrator discretion to extend the time for the execution of a warrant of eviction to 6 months.[52] Subsequent regulations were enacted prescribing the forms to be used, and the procedures to be followed for determination of fair rents.[53]

An original sunset clause limited operation of the *Fair Rents Act 1956* to the end of 1957. However, a series of successive annual amendments extended the Act to 1960, and it finally expired on the 31st of December, 1963, bringing to a conclusion many years of Government intervention in relation to private sector rentals.

FOOTNOTES - CHAPTER 1

1 *Landlord and Tenant Act, 1935*, 26 Geo V. No 42.

2 *Landlord and Tenant Act 1874*, Victoria 12. Two earlier statutes of general application were the:-

1) *Statutory Leases Act 1853*, which was introduced to facilitate the granting of certain leases in the colony at the time; and the

2) *Repairing and Maintaining Dwelling Act 1849,* 13. Vic. No 1. which enabled certain Ministers of religion, who occupied dilapidated dwellings, to receive long term government loans for maintenance works.

3 The remedy of distress describes the common law right of a landlord to seize (without legal process), the personal chattels of his tenant for non payment of rent. (See Woodfall's Law of Landlord and Tenant, Sweet and Maxwell, London, 1893). It is described by Woodfall as one of the most ancient and effectual remedies for the recovery of rent, having its origins in ancient feudal law. Originally distress operated not as a remedy because goods could be sold, but rather as a pledge to compel satisfaction of the demand for rent. It however became a means of great oppression in the hands of the Barons, and continual enactments were passed for tenant protection. During the 1800's legislation was weighted strongly in favour of the landlords. For an interesting insight into the operation of the distress remedy in England in the 19th century, see Englander D., Landlord and Tenant in Urban Britain 1838 - 1918; Clarendon Press. Oxford 1983.

4 Englander, D., op. cit. ch.2 at p. 25.

5 *Recovery of Possession of Tenements Act 1901*, 1 Edward VII.

6 Ibid, S.5.

7 See the Schedule to the Act, also restricting operation of the ejectment on a Sunday, Good Friday or Christmas Day. Similar restrictions appear in the 1935 Act which is still applicable.

8 *Recovery of Possession of Tenements Act 1921.*

9 *Landlord and Tenant Amendment Act, 1909.* (Edward VII, No.47)

10 Ibid, S.8 and 11.

11 Ibid, S.10.

12 Ibid, S.6.

13 *Landlord and Tenant Amendment Act 1929* George II, No.85, amending S.9 of the 1909 Act.

14 See "The Mercury" (Tasmanian daily paper) Wednesday, 31 August 1927.

15 Mr Campbell. M.H.A., cited in "The Mercury", 31 August, 1927.

16 Sir Walter Lee, cited in "The Mercury", 31 August, 1927.

17 *Landlord and Tenant Act (1935)* 26 GEO. V. No.42.

18 Journals and papers of Parliament. (1935). The Bill was first introduced into the parliament on 24 September, 1935, and passed the 2nd and 3rd reading on

2 October, 1935. It passed through all 3 readings of the Legislative Council, on the following day, and received Royal Assent on the 18 October, 1935. See 1935 Journals and Papers of Parliament, Vol CXII.

19 Acts repealed include those discussed in this chapter: *Landlord and Tenant Act 1874*, *Recovery of Possession of Tenements Act 1901*, *Recovery of Possession of Tenements Act 1921*, and *Landlord and Tenant Act 1927.*

20 Replevin refers to the remedy of a persons whose chattels are unlawfully taken from him.

21 Report on parliamentary proceedings, in "The Mercury" Thursday October 3, 1935.

22 *Landlord and Tenant Act (1935)* Part II, Section 9.

23 Ibid, S.12 and S.14.

24 Ibid, S.26.

25 Ibid, S.28.

26 Ibid, S.30 and S.32.

27 Ibid, S.32.

28 Ibid, S.36.

29 Ibid, S.41.

30 Ibid, S.43., also note treble damages for a "pound-breach" which is the offence of taking seized goods before the landlords claim has been satisfied.

31 Ibid, S.54 and S.48.

32 1920 - 21 Journals and Papers Parliament Vol LXXXII. Proceedings on bills. The bill was introduced by Cosgrove, read twice and referred to a select committee. The bill was introduced in the following parliamentary session, and rejected on the second reading in the Legislative Council.

33 "The Mercury" Thursday November 24, 1921. Report on the proceedings of the Legislative Council.

34 Only Victoria acted under the wartime regulations made pursuant to S.5 of the *National Security Act 1939 (Cth.)* No 15, 1939. All other States, including Tasmania, enacted State Legislation.

35 See Memorandum, Attorney General's Department, Hobart, 10 October, 1939. (State Archives). The Regional Boards were based in Hobart, Launceston and Devonport, and were constituted by 3 persons; a Police Magistrate, a Real Institute Representative and a member from the Hobart or Launceston Trades Hall.

36 Statistical records. Attorney General's Department 1939 - 1942 (State Archives).

37 "The Mercury", March 18, 1948.

38 *Landlord and Tenant (Temporary Provisions) Act.* No 28, of 1948. The National Security regulations ceased to apply to all States on 16 August, 1948.

39 *Landlord and Tenant (Temporary Provisions) Act.* No 48, of 1948.

40 *Landlord and Tenant Act.* No 21 of 1949, Section 4

41 The only qualification on the Crown, was that the premises occupied in consequence of employment (such as school houses, police residences etc) would be exempt if required by another employee. The original Bill exempted the Crown, but a subsequent amendment introduced in the Legislative Council was agreed to by the House of Assembly. See "The Mercury" April 7, 14, 1949.

42 In 1950, a Committee was set up by the Attorney General to investigate operation of the Act and to report, specifically, on the definition of prescribed premises, whether the restrictions on recovery of possession should be relaxed, and whether there should be any further amendments to the pegging of rents. Correspondence 31 August 1950. Rent Controller (Tas). State Archives.

43 See 1952 *Landlord and Tenant Acts*: (No 15, No 49, No 94); 1953 Acts, (No 49, No 11), 1954, (No 20). Some of these Acts made minor amendments to the law.

44 Parliament of Tasmania, 1954. *Landlord and Tenant Act 1949*, Report of the Select Committee of Legislative Council with Minutes of Proceedings; p.5.

45 Ibid, p 3.

46 Ibid, p 5.

47 *Landlord and Tenant Act* (No 2) , No 28 of 1954.

48 "The Mercury", Friday April 9, Saturday April 10, 1954.

49 "The Mercury", Friday November 9, 1956.

50 Ibid.

51 "The Mercury", Friday November 16, 1956.

52 "The Mercury", Wednesday November 21, 1956.

53 Statutory Rules, Fair Rents, No 3, 432, 1957.

CHAPTER 2

THE APPLICATION OF CONTRACTUAL AND PROPRIETARY PRINCIPLES TO RESIDENTIAL TENANCIES

2.0 Introduction

Residential tenancies law in Tasmania is comprised of principles embodied in:

(i) Real property law, whereby a tenancy agreement creates an estate in land, transferable between two parties.

(ii) Contract law, whereby the tenancy agreement creates contractual duties and obligations between the parties.

This duality of character is evident in an examination of the recent Australian case law[1] on the application of contractual doctrines to leases, and gives rise to certain conceptual difficulties.[2] The difficulties arise in part because differing consequences follow from the construction of the lease as a grant of an interest in land, compared with the construction of the lease as a contractual document. For example, under principles of land law, a landowner may attach specific conditions to the grant, breach of which give rise to forfeiture and allow the land to revert to the landowner. On determination of the tenancy, the tenant could be evicted (possibly by self help measures or by legal process), and the tenant would cease to have any interest in the land. On reentry the landlord had no right to damages for loss of rent. In contrast, under contract law, breach of a covenant in a lease, except for "substantial" breach of a fundamental term or a "repudiation", does not lead to forfeiture. However should the lease determine because of fundamental breach or repudiation by the tenant, the landowner is able to sue for damages. The quantum of damages would depend on whether the court adopts a narrow or broad theory of the nature of damages (later

discussed in this chapter), but the financial consequences of the test has to some extent been modified by the recent decision in *Vickers & Vickers v Stichtenoth Investments*,[3] which applies to the principle of mitigation of damage to leases.

The historical basis of the present law derives from the early feudal period, where the vast majority of tenancies were agricultural and contained few or no buildings. The major consideration revolved around the possession of land. Originally the 13th century villein had very little protection over his interests in the land, which was allocated to him by the lord of the manor. However gradually between the 13th and 16th century the landowner began to extend minimal protection to the tenant.

As common law concepts such as the doctrine of mitigation of damage and implied warrant of fitness for purpose developed as a part of contract law in the 18th and 19th century, these doctrines were not seen as applicable to tenancy agreements, on the basis that the relationship was proprietary rather than contractual. Prior to the more recent moves towards contractualisation of the law, Australian commentators pointed to the common law failure to recognise the changing social application of residential tenancies in these terms:

> "the failure of the law is that it has not changed significantly to encompass changing patterns of lifestyle by altering the status of a lease from an estate in land to a contract for services"[4]

Issues which are of concern to the modern urban tenant, such as: repairs, maintenance, habitability of premises were generally of little or no relevance in rural England prior to the industrial revolution, when tenancies were primarily agricultural. The modern link between the tenancy agreement and the land itself is tenuous, and seems inappropriate particularly in the case of flats, villas and multi-tenanted apartments.

In recognition of the diminishing relevance of the actual land, Australian courts have now begun to look more critically at the traditional assumptions governing the construction of leases, and to construe tenancy agreements on the basis of contract law.

This chapter briefly examines the interrelationship of contractual and proprietary principles, and explores some of the developments and implications of the current move towards the contractualisation of the law of leaseholds. In reviewing these developments, it is interesting to note those decisions where the application of contractual principles produces a legal effect which is inconsistent with traditional landlaw theory.

2.1 Repudiation

Repudiation of a contract occurs where one party to the contract shows an intention not to perform his/her part of the bargain. Explicit or express repudiation occurs where one party states explicitly that he/she will not perform his/her promise. Implicit repudiation occurs where the breach is one of reasonable inference to be drawn from the actions of the defaulting party.

The first Australian case dealing with repudiation in relation to leases, occurred in the 1906 High Court decision in *Buchanan v Byrnes*[1] where the Court found that a landowner had the right to claim damages for lost rent, maintenance and other taxes, after the tenant had abandoned the premises and the landlord had reentered. The case was decided on the basis of contract law, but despite this early application, the lead was not followed in subsequent cases.[2]

Modern Australian developments in the application of the doctrine appear to have followed from the 1971 Canadian decision in *Highway Properties Ltd v Kelly*

Douglas & Co Ltd,[3] and the 1981 House of Lords decision in *National Carriers Ltd v Panalpina (Northern Ltd),*[4] in which the court accepted the application of contractual law to leaseholds in principle, but not on the presented facts.

Shevill & Another v The Building Licencing Board[5] was the first recent case in which the High Court discussed the application of contractual principles, namely the doctrine of repudiation, to leases. *Shevill's* case concerned the right of the lessor (Building Licencing Board) to recover damages for loss of rent for the remainder of the term in circumstances where there had been a reentry for default in payment of rent. The facts of the case are relatively straight forward. As a result of financial difficulties the lessee (Shevill Truck Sales & Services Pty Ltd) had fallen into rent arrears. At a time when some rental arrears had been recouped from the lessee, but when the lessee was still 2 months in arrears, the lessor determined the lease by issuing a statement of claim for possession, which effectively amounted to a forfeiture. Several months later by an order of the court the lessee vacated the premises. It took the lessor 9 months to find new tenants, at an annual rental of some $4000.00 less than the original tenant. The lessor then sued the lessee for damages for breach of the covenants of the lease, claiming the outstanding arrears as well as the difference between the rent it actually received from the new tenants and the rent it would have received from the original lessee. The High Court held on the evidence, the behaviour of the lessee did not amount to repudiation although the lessee had breached the rental covenant. The evidence suggested in fact that the lessor still had the intention to fulfill the contract, according to its terms, to the best of its ability.[6]

In *Shevill* the High Court implicitly accepted the application of contractual principle to leases.[7] The case turned on the construction of Clause 9A of the lease, which provided that if the rent was unpaid for 14 days or if the lessee breached any of the covenants, or certain other contingencies occurred such as bankruptcy proceedings or liquidation, the lessor was empowered to reenter the land:

> "Without prejudice to any action or other remedy the lessor has or might otherwise or could have for arrears of rent or breach of covenants or for damages as a result of any such event."

The Court found that the lease as worded did not provide for the lessee's liability for loss of rent after reentry by the landlord. In examining the reentry clause, Gibbs C.J. said that the lessor's rights must be read distributively, so that the lessor has 3 separate courses of action - firstly, he has a remedy for rental arrears; secondly, he has a remedy for breach of covenants; and thirdly, he has an action for damages as a result of the other specified contingencies, such as liquidation or bankruptcy. The reference to pay damages in the reentry clause was confined the specified contingency events, and not to the failure to pay rent or breach of other covenants.

Although the decision in Shevill's case was based on the application of contractual principles, the results are also consistent with the application of land law principles, namely that on reentry by the lessor, the lessee is under no further obligation to pay rent.

The decision of the Victorian Supreme Court in *Ripka Pty Ltd v Maggiore Bakeries Pty Ltd*[8] was the first decision since *Buchanan v Byrnes*, to apply the doctrine of repudiation on the principles, and on the facts of the matter. In this case the lessor, Ripka Pty Ltd, had gone into debt to construct a reception centre, and rent from the centre was the lessor's sole income and was required to service loans. As a result of defaults in payment of rent by the lessee, Maggiore Bakeries Pty Ltd, the lessor was in serious financial difficulties. The lessor notified the lessee that the defaults were being treated as a repudiation of contractual obligations, and brought an action for possession, damages for lost rent and mesne profits to the date of possession. After reviewing earlier authorities Gray J. held that a lease could be repudiated under general contractual principles.[9] The decision in *Ripka* is consistent with general landlord principles, namely that on breach of the rental covenant, the lessee's interest

reverts to the lessor, and that damages are recoverable to the date of re-possession. The significance of *Ripka* is that it was argued and decided on contractual principles.

In 1985 the High Court in *Progressive Mailing Co v Tabali*[10] applied contractual principles in the construction of a five year commercial lease. Under the lease the lessor agreed to carry out certain works on the factory premises following town planning approval. The lease specified that following completion of the works the lessee would commence paying rent. The lessee's disputed that the works had been carried out, despite certification by the lessor's architect. After payment of rent for several months the lessee failed to pay rent for 4 months, and committed several breaches of the covenant to maintain and repair. The lessor sought an order for possession and damages. The High Court held in supporting the decision of the trial judge, that the lessee's conduct in failing to pay the rent for 4 months and its breach of other repair and maintenance covenants, amounted to a repudiation of the contract. The court reaffirmed the trial judge's decision to allow damages in the form of rent arrears, mesne profits, and the cost and delay in re-letting the premises.

The decision in *Progressive Mailing* case makes two important contributions in the development of the contractualisation of leases:

(1) The decision was justified explicitly on the basis of a contractual theory of leases. The fact that the lessee's breach showed an intention to act in a manner substantially inconsistent with his obligations, did as a matter of fact repudiate the contract. In the words of Brennan J.:

> "That conclusion makes it necessary to decide in this case, what was assumed but not decided in Shevill, namely whether the general contractual principles relating to rescission for anticipatory breach and damages for the loss of benefit of a contract apply when a lessee, by words or conduct repudiates his obligation under the lease."[11]

The majority of the High Court held that :

> "The ordinary principles of contract law, including that of termination for repudiation or fundamental breach apply to leases."[12]

In reaching their decision the court took account of the changing nature of tenancy contracts. In reviewing the move from the view of leaseholds as "analogous to a form of feudal tenure" towards the contractual construction of leases, Deane J. noted:

> "It has been a move towards the lease, at a commercial rental and for a shorter term, framed in the language of executory promises of widening content and diminishing relevance to the actual demise. It is apparent that the special rules of property law regarding "chattels real" are inadequate as the exclusive determinants of rights and liabilities under such modern leases. That being so, it has become necessary for courts to look somewhat more critically at the rational basis and justification of the traditional assumption that leases generally were beyond the reach of fundamental doctrines of the law of contract."[13]

(2) The second important contribution of *Progressive Mailing*, is that its result in relation to recovery of damages is consistent only with the application of contractual principles. Under principles of land law the lessor would have been entitled only to the recovery of rent arrears and mesne profits to the date of possession, but the *Progressive Mailing* decision permits the lessor to recover expenses directly and proximately resulting from the lessee's breach, namely expenses related to the cost and delays of re-letting.

The decision in *Wood Factory Pty Ltd v Kiritos Pty Ltd*[14] applied the High Court decision in *Progressive Mailing*, in holding that the principles of the law of contract are now generally applicable to leases. The facts of this case are somewhat complex to unravel, but in brief it appears that the lessor (Kiritos Pty Ltd) leased factory premises to the Wood Factory for a term of 3 years. Around 6 months later the

lessee's started moving out into adjacent premises. The rent remained unpaid for a period of 5 months, but was subsequently paid after proceedings were taken by the lessor for its recovery. During this period of time the lessor re-let the premises to the Insul Fluff Co, on a short term lease basis for no rental. 5 months later the premises were let to another company at a lower rental. The lessor sued the Wood Factory claiming the following: unpaid rent to the date of the last lease agreement, and the difference in rent between the reserved and re-let rent for the whole term of the original lease. The judge at first instance found that the Wood Factory's actions amounted to a repudiation, which had been accepted by the lessor where the premises were re-let commercially and, awarded the damages sought. The majority of the New South Wales Court of Appeal (Samuels J.A. dissenting) allowed the judgement regarding damages to stand.

In *Wood Factory* there is an extension of the principles governing recovery of damage to include expectation losses for the original term of the terminated lease. In *Progressive Mailing* the lessor recovered lost rent only for the part of the unexpired term for which he was unable to re-let the premises, and once the lessor re-let he was under the duty to do so at a rent sufficient to recover his costs. In addition the lessor was able to claim rent during a period in which he had allowed a third party to occupy the premises rent free.

The judgement of Samuels J. in dissent, is interesting to note, for he found that despite the rental arrears there had been no repudiation. He went on to hold that the lease to Insul Fluff amounted to a surrender by operation of law, and accordingly the lessee was only liable for unpaid rent to the date on which resumption of possession had occurred. It was the majority view, however, that a surrender by operation of law would not deprive a landlord of a claim for damages based on accepted repudiatory conduct or breach of a fundamental term occurring before surrender. The same act (such as a lease to a new tenant before the termination of the existing lease)

may evidence both acceptance of a repudiation of the tenants obligation under the lease and a surrender of them.

Two further cases remain to be discussed: A decision of the South Australian Supreme Court *Nai Pty Ltd v Hassoun Nominess Pty Ltd*[15], and a decision of the Supreme Court of Northern Territory in *Gallic Pty Ltd v Cynayne Pty Ltd.*[16] In *Nai* the lessee granted possession to a third party in breach of a covenant not to assign without the lessor's consent. The lessee also failed to pay costs and taxes for which it was responsible under the lease. The lessee then brought an action for possession and for the lessee's eviction. The lessee applied to the court for temporary protection of its right to possession, but this was denied by the court because the lessee had no protectable right to possession because of its repudiation of the lease. In examining the decision in *Nai*, Effron suggests that the doctrine of repudiation could be used to evade landlord/tenant statutes. He points out that:

> "In *Nai*, the case might just as easily be dealt with as a reentry by the lessor extinguishing the lessee's interest: However South Australia's *Landlord and Tenant Act (1936)* (S.10) requires the landlord to give notice before reentry and such notice had not been given. The court however apparently held that, if the lease could be held to be repudiated, the notice requirement for reentry under the statute did not apply because a "termination" for repudiation was not a reentry under the statute"[17]

The case of *Gallic* centered around Clause C1 of a lease which provided that breach of named covenants which remained unremedied for 14 days following notice from the lessor would be:

> "deemed to be a breach of an essential term of this lease amounting to a repudiation hereof by the lessee, and the lessor may without notice accept that repudiation and terminate this lease, but without prejudice to any other remedy, right or power which the lessor may have pursuant hereto."[18]

In noting significant aspect of Clause C1, Kearney J. identified it as a modern provision for termination probably stemming from the judgement of Gibbs J. in *Shevill*, namely that:

> "A covenant to pay rent in advance at specified times would not without more, be a fundamental term having the effect that any failure however slight, to make payment at the specified time would entitle the lessor to terminate the lease. However the parties to a contract may stipulate that a term will be treated as having a fundamental character ... and effect must be given to any such agreement."[19]

By defining every term as an "essential term", the lessor no doubt sought to exclude the application of *Shevill*. In his judgement Kearney J. acknowledges that the lessee's failure to pay rent for over 6 months amounted to a repudiation within the terms of Clause C1.[20] Kearney J. also treated the "essential breach" clause as a "forfeiture provision" which then allowed the lessor to use the summary ejectment provision of the Northern Territory *Real Property Act* (S.192) to recover immediate possession.[21]

Summary

In drawing together the implications of the discussed cases in relation to the application of the doctrine of repudiation to leases the following points emerge:

(1) Application of the Doctrine

It appears that there is general acknowledgement that the doctrine of repudiation is applicable to tenancy contracts, subject to the qualification expressed by Deane J. in *Progressive Mailing*, namely that the further the substance of the lease moves away from a contract for services to a contract which is better viewed as depending on an estate (such as a 99 year lease of agricultural land for peppercorn rental), the more difficult it will be to apply the doctrine of repudiation.[22]

(ii) Rent Arrears

A number of the cases reviewed in this section dealt with the issue of the lessees breach of the covenant to pay rent and the question of whether such non payment amounted to a repudiation. The decision in *Shevill* would appear to suggest that something more is required than the mere non payment of rent,[23] provided that the lessee shows an intention to be bound by the contract, and the situation is not such as to make further commercial performance of the contract impossible.[24] In *Ripka*, Gray J. in finding repudiation on the facts stated:

> "In this case the massive defaults in rent and other payments, does in my opinion evidence an inability to perform the contract. Furthermore, when one has regard to the lessor's obligations to its financiers, it can be said that the default goes so much to the root of the contract that it makes further commercial performance of the contract impossible."[25]

In *Progressive Mailing* the court found that the lessor's breach of the covenant to pay rent combined with other matters, showed an intention to act, only in a manner substantially inconsistent with his obligations under the lease.[26] In *Wood Factory* the court found the evidence of repudiation or breach of fundamental term may be found in the non payment of rent, when taken into account with the whole of the facts.[27] It appears that where there is a breach of the covenant to pay rent the test is predominantly one of intention (namely an intention to be bound by the contract), subject to the qualification that further commercial performance of the contract is not rendered impossible.

(iii) Calculating Damages

The issue of damages for the lessee who has repudiated a lease is problematic, and differences in the cases reviewed may be partially explicable in terms of differences in

the innocents party's claim. Effron has identified 3 contradictory methods of awarding damages for fundamental breach of a lease,[28] which arise from the cases discussed in this chapter:

(1) The *Ripka/Gallic* approach, which permits the lessor to claim rent in arrears and unpaid rent to the date of repossession by the lessor.[29]

(2) The *Progressive Mailing* approach, which permits the lessor to recover rent in arrears, unpaid rent to the date of possession by a new lessee, and the costs of finding a new lessee.[30]

(3) The *Wood Factory* approach, in which all unpaid rent during the term of the lease whether in arrears, or until the termination date of the original contract, regardless of possession by the lessor and/or a third party (although any payment by a third party is credited against the lessee's obligation).

The approach taken in *Ripka* and *Gallic* which holds that the lessee's obligation to pay rent concludes when the lessee no longer has the right to possession, would appear most consistent with the lessor's duty to mitigate loss, for the lessor has a financial incentive to re-let the premises at the market rental. The doctrine of mitigation of loss was expressly applied in a 1989 decision of the Supreme Court of South Australia in *Vickers & Vickers v Stichtenoth Investments* (later discussed in Chapter 2),[32] in which a lessor was held to be under a duty to take reasonable steps to mitigate his loss when a tenant abandoned leased premises by seeking another tenant.

(iv) Acceptance of Repudiation

The general rule regarding acceptance is well stated by Brennan J. in *Progressive Mailing*:

> "A promisor cannot by repudiating his obligation unilaterally alter the legal relationship between himself and the promisee. Until the promisee accepts the repudiation, the rights and obligations arising from the partial execution of the contract and causes of action that accrue from its breach continue unaffected. The promisee's acceptance of the repudiation is an essential element in the course of action for damages for anticipatory breach."[33]

The avenues for the promisee are twofold. Firstly, he/she may accept the repudiation and communicate this to the defaulting party, either explicitly, or through conduct such as re-letting to a third party.[34] At that point the contract is discharged and gives rise to an action for consequential damages. Secondly, the promisee may refuse to accept the repudiation, wait until performance is due and then sue for damages resulting from the breach.

One interesting issue which arises here, is the effect of the duty to mitigate loss on the question of acceptance of repudiation. If as established by *Vickers*, a landowner is now under a duty to mitigate his/her loss by taking reasonable steps to re-let the premises following abandonment, then it follows there must be a corresponding duty on the landlord to accept repudiation following abandonment. This would not appear to sit comfortably with the contractual principle that the landowners acceptance of repudiation is an essential element in the case of an action for consequential damages. The alternative approach is to say the duty to mitigate applies only from the point of communication of the acceptance of the repudiation which leaves open the possibility that the landowner could wait until the agreed term expired and sue for the unpaid rent to that date.

(v) Statutory Restrictions on Forfeiture

In a situation where the lease is liable to forfeiture, forcing the forfeiture determines the lessee's interest in the land and constitutes the lessor's election to accept

repudiation. Such acceptance, should be subject to any statutory restriction on enforcing forfeitures which may be contained in other tenancy related legislation. For example, Section 15(1) of the *Conveyancing and Law Property Act 1884 (Tas)* provides that a forfeiture will not be enforceable unless the lessor serves notice on the lessee specifying the nature of the breach and provides an opportunity for the lessee to remedy or pay compensation within a reasonable time. The decision in *Nai* and *Gallic* do not sit easily with this proposition. In *Nai,* Zelling J. heard that Section 10 of the *Landlord and Tenant Act (South Australia 1936)* which imposed a requirement on the lessor to give notice before reentry, did not apply because the termination of a lease for repudiation was not a "reentry".[35] In *Gallic,* Kearney J. held that expectancy of the lessee's repudiation by the lessor did constitute a "forfeiture" within the meaning of the Northern Territory *Real Property Act* (S.192)(4).[36]

Both these decisions strengthen the need for Residential Tenancy Acts to examine terminology to ensure that conduct is not redefined to avoid application of residential tenancy statutes. It is important that Residential Tenancy Acts firstly, prohibit "contracting out" and secondly, contain provisions stipulating that the legislation has effect despite any provisions to the contrary in an agreement. Consideration should be given to making it an offence to enter into a contract with the intention either directly or indirectly defeating, evading or preventing the operation of the Act.

2.2 Doctrine of Frustration

Under this doctrine, if a contract becomes incapable of performance because of unforeseen circumstances, both parties are relieved from their obligations under the contract. These unforeseen circumstances may include destruction of the subject matter, or reasons of long and unavoidable delay which may change the nature of the contract.[1] If the parties do not provide for what is to happen in such an event, the

performance of the contract may be regarded as frustrated and the parties are relieved from their contractual obligations. Traditionally, at common law, the doctrine was considered inapplicable to tenancy contracts,[2] for two reasons:

(1) Because the contractual obligations of the parties were regarded as only incidental to the transfer of the estate in land.

(2) The land on which the premises were situated remained in existence, irrespective of whether the premises did.

The consequences of failure to apply the doctrine created the ridiculous situation that if the rented premises were destroyed by fire, flood or storm, or were expropriated by a government authority, the tenant was still liable to pay rent.

Early decisions of the Australian courts consistently rejected application of the doctrine of frustration to tenancy contracts. In *Minister of State for the Army v Dalziel,*[3] the Commonwealth Government, acting under its National Security Regulations requisitioned tenanted premises. Despite the fact the tenant was dispossessed, the High Court found he was still liable to pay rent. Williams J. held that the doctrine of frustration did not apply to tenancy agreements.[4] Supporting case law for the earlier view is to be found in the New South Wales judgment of *Thearle v Keeley,*[5] where the premises were closed, pursuant to a public health order made by a local municipal council.

It was not until the 1981 House of Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd*, that the doctrine of frustration was held to apply to leases. In this case, the lease for a warehouse included a restricted covenant that the building be used only for the purposes of a warehouse. A local authority decision to close the access road due to an adjacent dangerous building, rendered the warehouse commercially worthless. In an action by the plaintiff for recovery of unpaid rent, the

defendants claimed that the lease had been frustrated by the event. In a majority decision (4:1), the court held that the law of frustration applied to leases but rejected its application on the facts. Lord Wilberforce noted that:

> "There is nothing illogical in implying a term that the lease should be determined on the happening of ... events ... which in an ordinary contract work a frustration."[6]

In the 1985 High Court of Australia decision in *Progressive Mailing*, the court applied contractual principles in the construction of a 5 year commercial lease. Although the primary issue in the case was a question of repudiation, support was given by all judges to the general application of all contractual principles including the principle of frustration to leases.[7] Some passing consideration was given by Brennan J. to the differing consequences of discharge of contracts by frustration and by repudiation.[8]

A number of states have incorporated various frustration provisions into their Residential Tenancies Act, but in states where the landlord/tenant relationship has not been codified, application of the doctrine of frustration under the common law is a useful development.

Reform Options

(i) *Restricted application of the doctrine of frustration.* This is the approach recommended by Sackville.[9] This would render the doctrine applicable and confined to situations where the premises become unfit for habitation, regardless of whether the unfitness results from the negligence of the landlord, or from fire, flood or other causes, beyond the control of the landlord and tenant.

(ii) *General application of the doctrine of frustration.* In a number of jurisdictions[10], provisions have been introduced, making the doctrine of frustration of covenants applicable generally to leases and tenancy agreements relating to residential premises. The advantage of the second approach would be the inclusion of grounds of "requisition" or "repossession", excluded by the first option, which specifically applies to "fitness of habitation".

(iii) *Consideration of partial frustration.* This issue was discussed by the Law Reform Commission and the Sackville report, in considering the question of whether or not a tenant renting premises which become only partially habitable, should be entitled to some partial abatement of rent. Although it was recognised by the Law Reform Commission that a general application of the doctrine would not produce this result, the Law Reform Commission recommended that any proposed laws should provide that partial inhabitability should result in a rent reduction.[11] It may be possible to construct some abatement scale, dependent on the degree of inhabitability, although the Law Reform Commission declined to recommend this in their report.

2.3 Mitigation of Damages

The principle of contractual and tort law here, is that if a party to a contract breaches a material term of the agreement, the claimant party is obliged to take reasonable steps to minimise the damages, or loss, resulting from the breach. Traditionally the courts have determined that the doctrine of mitigation will not apply in respect of tenancy agreements.[1] In consequence if a tenant vacated the premises before the end of the tenancy agreement, the landlord could sue him/her as each rent payment became due, and was under no obligation to reduce loss by finding a new tenant to take over the premises. This situation arose in *Maridakis v Kouvaris,*[2] a 1975 decision of the Northern Territory Supreme Court. In this case the plaintiff had sublet premises to

the defendant for a 2 year term at a weekly rental of $100.00. One month after moving in, the plaintiff abandoned the premises, and the premises remained unlet for approximately 15 months, until a new tenant was found, at a reduced rental of $70.00 per week. The court held that the landlord was under no obligation to mitigate his loss, by accepting another tenant at an earlier opportunity for less rental.[3] Accordingly the lessor was entitled to rental arrears in respect of the 15 month period, but not the difference in rent after re-letting.

Failure to apply the doctrine of mitigation of damage was regarded by most commentators as unreasonable.[4]

> "Indeed so unreasonable is the existing law that even if a new tenant were to offer to take over the premises, the landlord could refuse on the grounds that he preferred to keep the premises vacant and sue the original tenant."[5]

In analysing the application of the principle of mitigation to landlord/tenant law, prior to the decision in *Progressive Mailing* Bradbrook stated:

> "... the present rule of no mitigation is just one of the many anomalies caused by the failure of the law to encompass changing patterns of lifestyles and to recognise that in today's society, it is far more realistic to regard a lease as a contract for services, rather than merely a grant of an estate in land."[6]

Indications that the courts were beginning to reevaluate their assumptions concerning the construction of leases purely in land law terms, is evident in *National Carriers* and *Progressive Mailing*. Although in *Progressive Mailing* the High Court did not deal with the issue of mitigation, obiter support is given for introducing the range of ordinary contractual principles into the construction of leases.[7]

In 1989 the South Australia Supreme Court in the case of *Vickers & Vickers v Stichtenoth Investments Pty Ltd*[8] considered the question of a landlords duty to mitigate loss, in a situation where the premises were abandoned by the assignees of the tenant. The facts of the case are relatively straight forward. In 1981 the lessor leased shop premises to the tenant (Vickers) for an initial 3 year period. With the consent of the landlord Vickers assigned the lease on the 31st of October 1986. In the Deed of Assignment (CL.5.) Vickers agreed to indemnify the lessor against all losses arising out of a breach of the lease by the assignees. The assignees paid 2 instalments of rent, abandoning the premises without prior notice in September 1987. The lessor re-entered the premises in September 1988 and sought to obtain from Vickers the rent and other amounts up until the 30th of August, 1988. The judge at first instance rejected argument by Vickers that the respondent was under a duty to mitigate loss, and the matter went to the South Australian Supreme Court on appeal, on the question of whether the duty to mitigate loss applied to leases.

Bollen J. found that the landlord was under a duty to mitigate his loss by taking steps to re-let the premises when the tenant abandoned the premises. In reaching this decision Pollen J. was cognizant of 4 factors:

(i) The dicta in *Progressive Mailing*.[9]

(ii) The introduction of an express duty to mitigate in the Residential Tenancies Act, and the absence of a related express duty in the *Commercial Tenancies Act*.[10]

(iii) An earlier decision of the tribunal in *Pergoli v Ceczyncki*.[11]

(iv) The criticisms made by the Australian legal commentators on the common laws failure to imply the principle of mitigation of damages to leases.[12]

The weight assigned to these considerations can be best summed up in Bollen J.'s own words:

> "I think it follows from *Progressive Mailing House* that all the ordinary principles of contract law "apply to leases". Mitigation of damage is an ordinary principle. I agree too with the views of Mr Bradbrook."[13]

He continued to stress that the law should recognise the importance of the contractual aspects of the modern lease.

> "Why should a vendor of tomatoes faced with refusal to take delivery by his purchaser suffer if he does not sell if he can, and yet a quiescent and immobile landlord not suffer if he fails to seek another tenant? Modern ideas says there is no reason for this anomaly."[14]

It seems that the question of the duty to mitigate loss in relation to leases has now been settled at least at the level of jurisdiction of a State Supreme court. It would seem unlikely given the dicta in *Shevill*, *Progressive Mailing* and subsequent cases that the Australian High Court would fail to apply the contractual doctrine when it next decides on the matter.

It remains now to consider the introduction of the principle into residential tenancies legislation.

Reform Options

Reforms in other Australian states have introduced the general contractual principle of mitigation of damage into the new residential tenancies legislation.[15] The South Australian legislation specifically applies the principle in respect of abandoned premises[16] and in respect of loss or damage resulting from breach of contract generally.[17] Bradbrook points out that the wording of the Victorian legislation in Section 106(1)(e) is preferable to a general enactment, that the doctrine of mitigation as defined in the general body of contract law, should apply in respect of a breach of tenancy agreement.[18] Section 106(1)(e) of the Victorian legislation prescribes that

the tribunal must take into account "whether or not any action was taken by the applicant to mitigate loss or damage," as one of seven relevant conditions to be considered in making an order for compensation. Alternatively Section 1951.2(a)(2) of the Californian civil code might be imported which reads:

> "The landlord is permitted to collect the amount of rent that would have been earned between the time of termination of the lease and the day of judgment, less any amount the tenant proves could have been reasonably avoided by the landlord."[19]

2.4 The Doctrines of Unconscionability

Under this doctrine the court may set aside a contract, or a clause or a term within a contract, if the term is harsh or unconscionable, or such that a court of equity would grant relief. In *Lloyds Bank Limited v Bundy,*[1] the English Court of Appeal held that a guarantee by a father of his son's debts were invalid because of undue influence on the part of the bank. After reviewing the relevant law Lord Denning said:

> "... when the one (party) is so strong in bargaining power and the other so weak - that, as a matter of common fairness, it is not right that the stronger should be allowed to push the weaker to the wall.
>
> Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to unite them. Gathering all instances together, I would suggest that through all instances runs a single thread. They rest on inequality of bargaining power."[2]

In his judgment Denning outlined 5 categories of transactions where he felt inequality of bargaining power should give a remedy: duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements. Lord Denning however expressly declined to extend the doctrine to provide a remedy for exploitative rent,[3] although he did not expressly rule out the possibility that the doctrine might apply to other unconscionable covenants in a tenancy agreement.

The doctrine of unconscionability is not yet well developed in Australia, and there has been no cases dealing with the application of the doctrine in the area of residential tenancy agreements. Traditionally the High Court of Australia has restricted the use of unconscionability to situations where on the part of the plaintiff there is:

> "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkeness, illiteracy or lack of education, lack of assistance or explanation where assistance and explanation is necessary."[4]

As the findings of the Australian Commission of Inquiry into poverty[5] identified some of Australia's most vulnerable groups of tenants, it would seem that many tenants would be entitled to ask the court to set aside the contract of specific terms in it on the basis of unconscionability. However the requirement placed on the plaintiff to show some special disadvantage arbitrarily restricts the capacity of the principle to address unconscionable practices affecting the community at large.

An alternative approach would be to point to the clauses in the contract themselves, as providing evidence of the exploitation of disadvantage. This approach would proceed on the view that when a contract is grossly one sided a court may infer that a position of disadvantage existed and/or some unfair use was made of the inequality in bargaining power. Effron has pointed out:

> "Such a justification would succeed on the presumption that a reasonable person would not agree to a term of such gross disproportionality in the absence of exploitative conduct by the other party."[6]

This approach which focuses on the content of the document rather than the personal characteristics of the plaintiff, significantly increases the class of persons who may qualify for protection under the contractual doctrine of unconscionability. Standard form contracts prepared by real estate agents are generally provided to tenants on an

industry wide "take it or leave it" basis, and provide little or not scope for negotiation. Often the terms of the tenancy contract are onerous and their onerous nature is disguised by using complex legal language. In many instances the conditions are numerous and provide for forfeiture should the tenant breach any one of the many trivial conditions. While inequality of bargaining power in itself is not unconscionable, a claim for unconscionability should lie where the content of tenancy contracts suggest that there has been a conscious use of this disparity. Bradbrook has pointed out that the common law has considerable potential in the area of landlord/tenant law, if one party could show that he/she did not have equal bargaining power and was therefore unable to negotiate over an onerous clause.[7]

In other contractual areas of law, the courts have recently shown more willingness to recognise the relevance of fair conduct and the problems of unequal bargaining power. The 1983 decision in *Commercial Bank of Australia v Amadio*[8] is one of a recent line of authorities in which the High Court has upheld the equitable jurisdiction to set transactions of sale aside as unconscionable, whenever one party by reason of some condition is placed at a special disadvantage and the other party takes unfair advantage of the opportunity. In *Waltons Stores (Interstate) Ltd v Maher,*[9] the High Court acted to prevent Walton's from escaping its liability to complete a contract, because of Walton's unconscionable and unfair conduct, in remaining silent when they knew the respondents were erecting a building on the basis of an assumption that they had an agreement with Walton's, and that completion of the exchange was a formality. To date there has been no cases with the common law doctrine of unconscionability in relation to residential tenancy agreements. Cases so far have concerned contracts involving guarantees, conveyances, building contracts etc., but there seems to be no reason why a tenant should not be able to apply to a court for a declaration that a lease or certain terms of the lease are void for unconscionability. A tenancy agreement is a contract and on the basis of the ratio in the High Court decision in *Progressive Mailing House v Tabali*[10] and subsequent

cases,[11] the ordinary principles of contract law, including the doctrine of unconscionability should now be held to apply to leases.

Statutory Developments

In 1975 when Lord Denning was attempting to extend the law of unfair trading, the unfair practices division of the Trade Practices Commission was created in Australia. Section 52A of the *Commonwealth Trade Practices Act* prohibits corporations from engaging in conduct which is unconscionable in relation to the supply of consumer goods and services ordinarily acquired for personal, domestic or household use or consumption. In most cases real estate agents would fall within the jurisdiction of the *Trade Practices Act*, and accordingly would be bound by its unconscionable conduct provisions. There is no definition of unconscionable conduct in the *Trade Practices Act* although it does provide a list of non exclusive factors to be taken into account in determining whether unconscionable conduct has occurred. These are:

(i) The relative bargaining strength of the parties.

(ii) Whether the consumer had to comply with conditions which were not reasonable necessary for the protection of the corporations legislative interest.

(iii) Whether the consumer was able to understand the nature of the documents used in the transaction.

(iv) Whether undue influence or pressure or unfair tactics were used.

(v) Whether and under what terms the consumer could have acquired identical goods from someone else.

The remedies for unconscionable conduct do not attract criminal sanctions or give rise to damages as such. However both Commission and tenants can apply to the Federal Court for other remedies for contravention of Section 52A. Remedies provided under the Act include injunction (S.80), and various orders which may be

imposed under S.87 (including refunds, payment or compensation to persons who have suffered loss, and orders for specific performance).

Two important aspects should be highlighted about remedies. Firstly, unconscionable conduct amounting to a contravention of S.52A, and S.60 may be pleaded as a defence in State Courts, in circumstances where conduct affects the validity of the contract in question, which the other party is attempting to enforce. In addition a tenant may seek a remedy based on S.52A where unconscionable conduct can be proved, or seek damages or other remedies where undue harassment, coercion or physical force have been used. Secondly under the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*, State Courts can now hear claims by individual based on a breach of S.52A, subject to the jurisdictional limits of the court. As a result of the recent changes remedies for unconscionable conduct are now more affordable and accessible to tenants.

Generally most landlords would fall outside the jurisdiction of the *Trade Practices Act* unless their operations cross state boundaries. A Fair Trading Bill[12] which mirrors the provision of the *Commonwealth Trade Practices Act* is to be debated by the Tasmanian Upper House during the next sitting of parliament. Private landowners who rent residential dwellings will be bound by the unconscionable conduct provisions of the proposed legislation.

Reform Options

Under Section 7(3) of the Victorian legislation, the doctrine is expressly introduced in the following terms:

> "On application by a tenant under a tenancy contract, the tribunal may make an order to declare void or vary a term of the tenancy agreement, if it is satisfied that the term is harsh or such that a court of equity would grant relief."

A similar clause is to be found in Section 92(1) of the South Australian Act. The phrase "harsh and unconscionable" is not defined in either Act, but it may be useful to provide criteria, along the lines developed under the *Trade Practices Act*, in order to assist a tribunal in the determination of whether a term is harsh or unconscionable. This has been done in other overseas jurisdictions.[13]

2.5 Implied Warranty of Habitability

The common law of contract implies certain conditions and warranties into contracts. One of these terms is an implied promise by the seller, where he or she is made aware of the purpose for which the goods are required, that the goods supplied will be reasonably fit for that purpose. As most tenancy contracts specify that the premises are to be used solely for residential purposes, it would appear, prima facie, that the common law should imply a warranty of fitness for human habitation into the tenancy agreement. However the application of this contractual principle has been severely restricted in the case of residential tenancy agreements. Both the English and Australian courts have been influenced by the doctrine of "Caveat Emptor" (let the buyer beware).

The common law position has been that the implied warranty of habitability only applies to furnished premises, and is restricted to the state of the premises at the commencement of the tenancy only. The principle derived in part from an early English decision in the case of *Smith v Marrable*[1], which occurred in 1843. In this case, Sir Thomas and Lady Marrable took a 5 week lease over a furnished house in Brighton. However 3 days after occupying it, they found it was so infested with bugs that they gave notice to leave. The landlord then sued for 5 weeks rent, but the Court of Exchequer found they had been fully justified in giving their notice. In the following year a similar case, *Hart v Windsor*[2] came before the Court of Exchequer, but by this time Parke B. had reconsidered his opinion on the question of

the warranty of habitability. But instead of holding *Smith v Marrable* had been wrongly decided, he decided to distinguish the two cases on the ground of whether the premises were furnished, holding that since the premises were unfurnished in *Hart v Windsor*, there was no implied warranty of habitability. A series of subsequent cases[3] supported the approach taken in *Hart v Windsor*, leading to the somewhat artificial distinction still applicable in Tasmania in 1990.

Despite its usefulness, neither the Australian nor English courts have ever taken the opportunity to expand the covenant into an implied covenant of habitability for all residential premises. In fact as recently as 1968 the New South Wales Supreme Court declined to apply the implied warranty of fitness to furniture or appliances. In *Pampris v Thompson*[4], the tenants wife received an electric shock from a faulty refrigerator which had been supplied by the landlord. The tenant attempted to sue the landlord for breaching the implied warranty of habitability, but was unsuccessful. The court held that the warranty did not extend to the dangerous conditions of appliances or furnishing.

In summary:-

(i) The distinction between unfurnished and furnished premises seems somewhat anomalous, and it is difficult to find any real justification for its continuance.

(ii) In consequence of the distinction, the warranty does not even apply where the agreement contains an express covenant that the premises be used for residential purposes only.

It remains to consider the issue of whether such a warranty can be implied, in situations where the landowner is under a statutory duty to comply with provisions regarding the standard of premises, established under other related acts (as for example legislation concerning substandard housing).

In *Liverpool City Council v Irwin,*[5] the House of Lords were prepared to imply a covenant to repair in a situation where the plaintiffs who lived on the 9th and 10th floor of a 15 storey housing block, had difficulty in gaining access to their apartments because of the Council's failure to repair and maintain the premises. On inspection the County Judge found that the lifts were out of action, the staircases were unlit, and the general conditions were appalling. In addition there were sanitary problems relating to malfunctioning toilets in some of the apartments. The House of Lords found these defects to amount to a breach of Section 32 of the *Housing Act 1961*, which required sanitary conveniences to be in "proper working order". The Court also found that there was an implied covenant for the tenants and their licencees to use the stairs and rubbish shutes, and an obligation was to be read into the contract that the Council should maintain the means of access. The Court noticed that it did not have the power to introduce any items which it though reasonable, however it was prepared to grant an implied covenant to repair arising from the statutory obligation placed on the Council under Section 329 of the *Housing Act 1961.*

On the basis of *Irwin* it would appear open to argue that where parliament has legislated to provide standards in relation to residential housing, the meeting of these standards should be an implied term in the tenancy contract. The lessor's promise of compliance with provisions and regulations pursuant to the *Substandard Housing Control Act*, would therefore become an implied term of the tenancy contract.

Notwithstanding this decision, the Supreme Court of New South Wales in *Brilee Consultants Pty Ltd v Tibal Holdings*[6] declined to imply a covenant on the lessors to render the premises fit to comply with fire safety orders. The Court also held that no such term could implied into the lease as a part to the completed bargain. Waddell J. did however point out that:

> "It is quite arguable that the law should impose on lessors an obligation to keep demised premises fit for occupation during any lease which is for a substantial term. However, the implied obligations the general law does impose on lessors is very limited indeed .... However, what the plaintiff seeks to establish in the present case is, of course, an implied term which goes much further, namely one which obliges the lessor to alter and add to the premises so as to comply with statutory requirements for fire precautions."[7]

Although the decision in *Brilee* can possibly distinguished from *Irwin*, on the basis of the nature of the commercial rental agreement, and the major nature of the renovations, it is difficult to reconcile both cases.

Although historically the application of the warranty of habitability appears restricted by *Smith v Marrable*, and *Hart v Windsor*, there are good grounds for arguing that the whole range of contractual principles including the contractual principle relating to fitness for purpose, should now be applied to tenancy agreements. Where housing legislation prescribes specific standards for the quality of rental housing, then it is suggested that these standards should become an implied term of the tenancy contract, so that the tenant may rely on such provisions in obtaining necessary repairs and maintenance. In the absence of residential tenancy legislation which imposes a comprehensive duty to repair on the landowner, such developments would constitute an important means by which the common law could address the problem of "fitness for purpose" in relation to residential tenancies.

Statutory Developments

The warranty of fitness for purpose in relation to the sale of goods was incorporated into S.19 of the *Sale of Goods Act (Tas) 1896*, but the definition of "goods" in S.3, does not include property.

The common law principles regarding fitness for purpose have to a large extent be codified under the *Commonwealth Trade Practices Act 1974* and various State Acts governing fair trading. Section 71(2) of the *Commonwealth Trade Practices Act* provides that goods must be suitable for any particular purpose made known to the supplier when negotiating or arranging to purchase of the goods, or a purpose which is obvious when certain standards in which the sale took place. Section 74(2) also introduces a requirement of due care and skill on the carrying out of the contract for services. If a lease is to be more properly regarded as a "contract for services" rather than a "interest in land", then it is open to argue that a wide interpretation of S.74 of the *Trade Practices Act* might enable the tenant to seek redress where the other party falls within the jurisdiction of the Act.

Reform Options

To a large extent the warranty of fitness for habitation has been rendered redundant, as residential tenancy Acts have introduced a comprehensive duty to repair on the landlord and a range of enforcement procedures.[8]

2.6 Mutuality of Covenants

The principles governing mutuality (interdependence) of covenants in contractual law, provides that where a material (ie vitally important) covenant is breached by one party, the other party is relieved of his/her obligations which arise under the contract. Application of this principle has been restricted in the area of residential tenancies, on the basis that the landlord/tenants relationship has traditionally been regarded as proprietary rather than contractual. It is however possible for the parties to draft a tenancy agreement making the covenants interdependent.

In the English decision in *Taylor v Webb*[1], the court found that the covenant to pay rent was not dependent on the landlord's covenant to repair, with the result that when sued for rent, the tenant could not argue that he was entitled to withhold the rent because the landlord did not keep his covenant to repair.[2] In addition, failure of the landlord to keep the covenant to repair does not entitle the tenant to quit the premises.[3] Several Australian cases also support this view. In *Re De Garis v Rowe's Lease*[4] the two covenants under consideration were (1) the covenant not to sublet without permission and (2) a covenant on the landlord's part that he would rebuild within 4 months in the event of destruction of the premises. The court held that the covenants were independent, and therefore the landlord was not entitled to use the argument that the tenant had sublet without permission in order not to rebuild. Supporting Australian case law is to be found in *Bishop v Moy*.[5]

In summary, the general problems raised by existing law are:

(1) That a tenant's obligation under a residential tenancy agreement continuing full force and effect, notwithstanding the fact that the landlord may have breached, and be continuing to breach, significant covenants.

(2) The implications of this are, that if the landlord breaches a covenant such as the covenant for quiet enjoyment by harassing the tenant or interfering with the central services, the tenant is not entitled to withhold rent to bring pressure on the landlord, or even to quit the premises.

Reform Option

Australian legislatures have declined to specifically introduce the doctrine of mutuality of covenants into landlord tenant law. Neither the Sackville report[6] nor the Tasmanian Law Reform Commission Report No. 19 recommend introduction of the doctrine of interdependence of covenants. It was the opinion of the Law Reform

Commission that the doctrine would invite "self help" remedies, and create more problems than it would solve.[7]

Other state legislation however statutorily defines the circumstances in which the tenant in justified in withholding rent, where the landlord fails to perform major obligations arising under the Act or agreement. Under Section 22(1)(d) of the South Australian *Residential Tenancies Act 1978-81*, where a dispute has arisen between the parties and the tenant applies to the tribunal, the tribunal may authorise payment of the rent to the tribunal until: either (1) the agreement has been performed, or (2) an application for compensation has been determined. Similar provisions exist in the Victorian legislation in Section 10(1) but the permission to withhold rent is confined to repair disputes.

These reforms have several advantages over importing the contractual doctrine of interdependence of covenants directly into new legislation. In brief, the provisions: firstly, restrict the extent of self help measures and secondly, ensure that the reason for with holding rent is genuinely related to the breach of covenant, by requiring payment into the tribunal.

2.7 Modification of Other Contractual Principles

Reforms in other states have impacted on the pre-existing nature of the contractual relationship between landlord and tenant in a number of ways, including granting power to the tribunal to:

(i) Reduce a fixed term tenancy on the basis of hardship.[1]

(ii) Order in certain circumstances, a person to enter into a tenancy agreement against his or her will.[2]

In addition, parties are restricted in their ability to negotiate their own contractual terms by the requirement in legislation for agreements to be in a prescribed standard form.[3] Other provisions, enabling the tenant to challenge excessive rent,[4] and granting the tribunal power to fix maximum rents, constitute important modifications to the common law position that a court will enforce any rental agreement, freely negotiated between the parties.

2.8 Conclusions

This chapter has reviewed the major Australian cases which deal with application of contractual principles to leases. There seems to be a clear line of authority for the proposition that the contractual doctrines of repudiation and frustration are now to applied in the construction of leases.[1] In relation to the principle of mitigation of loss, the evidence[2] suggests that the courts may now be willing to apply this principle in the calculation of damages which arise from breach of the tenancy contract.

There is a persuasive case to be made out for the general application of contractual principles to tenancy contracts. Australian legal commentators[3] have been critical of the common law's failure to apply contractual principles to leases. In summing up his assessment of the state of the common law in relation to repudiation of leases, Mackie notes:

> "Once it is recognised that the doctrine of repudiation and frustration in principle apply to leases, there seems little reason to deny the parties to a lease the full range of contractual principles and remedies."[4]

Several final issues remain to be clarified before concluding this chapter.

(i) Other Contractual Doctrines

Other contractual doctrines have been omitted from discussion in this chapter,[5] notably misrepresentation which under contract law may be used as a cause of action or a defence to an action. In *Gallic* the lessee raised misrepresentation as a defence to a fundamental breach involving non payment of rent. Although on the facts the lessee did not succeed, Kearney J. left open the possibility that in other circumstances a lessee might bring an action for misrepresentation:

> "If a lessee wishes to enforce against a lessor's rights arising from misrepresentation by the lessor, it must do so by other means; for example, by instituting an action for damages."[6]

It has been noted by Effron that the application of misrepresentation to tenancy agreements, only makes sense if one gives a contractual account of the lease, and that the notion of "misrepresentation" by a "grantor" makes no particular sense.[7] He continues by stressing that misrepresentation has a potentially wide application to leases, specifically in relation to the pre-contractual negotiations between the parties, where one party may by false representation or even by unjustified silence in some circumstances, induce the other to enter the contract.

(ii) *Commercial v Residential Leases*

There appears to be 2 divergent views on whether contractual principles as a whole should be applied uniformally to both residential and commercial leases. The argument in favour of uniform application rests on the shared contractual basis of both types of lease.[8] The cases reviewed in this chapter have all dealt with commercial leases, so it possible (although unlikely) that one could narrowly construe the ratios, so as to confine application of contractual principles to commercial tenancies.

Effron has argued that there are a number of good reasons for making a distinction between both types of leases in terms of applying contract law.[9]

The first of these assumptions relates to the ideals of contract law; namely that a contract is to be understood as a "meeting of minds", in which there is a mutually - beneficial exchange, which each party enters willingly for his own benefit. The reality of the making of tenancy contracts is that they often fall far short of this ideal. This is where the application of the contract law becomes problematic; for as Effron points out, it is the ideal that governs the rules and it is the rules that determine how the cases will be decided. In his analysis of the common laws attempt to address imbalances of economic power through development of relevant contractual principles, he comments on the artificial limitations placed on many of the doctrines. These restrictions prevent the doctrines from providing effective remedies against the exploitation of disadvantage.

The second argument against application of the full range of contractual doctrines to leases concerns the ability of tenants to shoulder some of the negative consequences of the complete contractualisation of the law. In many instances the application of contractual principles to leases provided new opportunities to tenants in obtaining remedies (such as injunctions and Writs for specific performance), in situations where the landlord has breached a fundamental term of the lease. However the application of contractual principles is problematic, specifically in situations where the tenant may abandon the premises, or where it may be necessary for a tenant to quit a fixed term tenancy earlier without the owners consent.

The impact of contractualisation (in contrast to the tenants traditional rights at land law) is that the tenant who abandons the premises remains liable to pay rent on premises that he/she has no right to occupy. The pitfalls and opportunities of the complete contractualisation of the law in relation to leasehold has been discussed at

some length by Effron. In his assessment of the application of the contractualisation he draws to this conclusion:

> "When courts do come to the issue of applying contract law to residential tenancies, they will face the dilemma that residential tenants are better able to enjoy the benefits of contract law, but are far less able to shoulder its burdens than their commercial counterparts."[10]

To some extent Effron conclusions would be modified by the recent decision in *Vickers*, as the ability of the landowner to recover damages would be restricted by the duty to mitigate loss. Nevertheless the consequences under the contractual law in respect of the implications of abandonment, notwithstanding the duty to mitigate, exceed those imposed under traditional principles of land law. It seems from Effron's analysis that the application of contractual principles to residential tenancy contracts, remains somewhat of a "two edged sword". This points to the need for some careful consideration to be give to the incorporation of contractual principles in relation to residential tenancies legislation, in order that the common law doctrines be qualified and redefined to fairly protect the interests of both parties to a residential tenancy contract.[11]

(iii) It is likely that as contractualisation of the law in relation to leases develops that certain conceptual problems will arise because of the duality of character is ascribed to leaseholds. This may arise, for example, where the contract is in essence one based on an interest in land (such as a 99 year lease of unimproved land for nominal rental) rather than a contract which more accurately reflects a contract for services. In *Progressive Mailing*, Deane J. noted:

> "The actual application to leasehold interests of the common law doctrines of frustration and termination for fundamental breach involve some unresolved questions which are best left open to be considered on a case by case basis, whereby adequate attention can be focused on any particular problems which might be overlooked in an effort at judicial codification."[12]

Chapter 2 Additional Notes

The discussion on repudiation in Chapter 2 omitted mention of the decision in *Laurinda Pty Ltd v Capabala Park Shopping Centre Pty Ltd* (1989)63 A.L.J.R. 372.

In this case the lessor (Capalaba) failed to register the lease and after excessive delay of some ten months, the lessee's solicitor wrote to the lessor requesting registration within 14 days and reserving the lessee's rights in the event of default. The lessor's solicitors indicated they were taking instructions but took no other action within the 14 days. Subsequently the lessee vacated the premises purporting to rescind the agreement on the basis that Capabala had repudiated the agreement. The High Court held that the agreement had been validly terminated.

It was held that the lessor's failure to respond to the letter demanding registration of the lease coupled with the long delays gave rise to an inference that the lessor would render performance in a manner substantially inconsistent with his obligations. The decision deals in part with the question of whether delay in itself is sufficent to draw an inference of repudiation. Brennan J notes that:

> " More than a mere failure in timeous performance is necessary to warrant an inference of repudiation, but delay may be so serious as to amount to a refusal to perform and in such a case an innocent party has a right to rescind."

There is an implicit acceptance in this case of the application of the contractual principle of repudiation to leases, but there is no futher elucidation on the application of other contractual principles to leases.

FOOTNOTES - CHAPTER 2

2.0

1 "It is both an executed contract and an executed demise", per Deane J. in *Progressive Mailing House v Tabali* (1985) 59 A.L.J.R. 373 at p.388. "... A lease involves both a contract and the creation of an estate in land; there is privity of contract and privity of estate", per Kearney J. in *Gallic Pty Ltd v Cynayne Pty Ltd* (1986) 83 F.L.R. 31 at p.38.

2 Some unresolved issues include the application of inconsistent tests for the extent of liability for damages as a result of repudiation, and the impact of the principle of mitigation of loss on the issue of acceptance of repudiation.

3 [1989] S.A.S.R. 90.

4 Bradbrook, A. Poverty and the Residential Landlord - Tenant Relationship, A.G.P.S. Canberra 1975 at p. 2.

2.1

1 (1906) 3 C.L.R. 704.

2 See *Firth v Halloran* (1926) 38 C.L.R. 261 (Isaacs J. in dissent).

3 17 D.L.R. (3d.) 710.

4 [1981] A.C. 675.

5 (1982) 56 A.L.J.R. 793.

6 Ibid per Gibbs C.J. at 795, and per Wilson J. at 798.

7 Ibid per Gibbs C.J. at 794, "I am content to assume that the ordinary principles of contract law are applicable".

8 [1984] V.R. 629.

9. Ibid per Gray J. at 634.

10 (1985) 59 A.L.J.R. 373.

11 Ibid at p.383.

12 Ibid per Mason, Wilson, Deane and Dawson J.J.

13 Ibid at p.388.

14 [1985] 2 N.S.W.L.R. 105.

15 [1985 - 86] A.N.Z. Conveyancing Reports 349.

16 (1986) 83 F.L.R. 31.

17 Effron J. "The contractualisation of the law of leasehold: Pitfalls and opportunities" (1988) 14 Monash Law Review, 83 at p.91.

18 (1985 - 6) F.L.R. at 35.

19 (1982) A.L.J.R. 793 at p.795.

20 (1986) 83 F.L.R. 38.

21 Ibid at p.38.

22 (1985) 59 A.L.J.R. at p.389 where Deane J. pointed out that: "one may reach the case where it would be quite artificial to regard the tenants rights as anything more than an estate or interest in land (e.g. a 99 year lease of unimproved land on payment of a premium with nominal or no rent).

23 (1982) 56 A.L.J.R., per Gibbs C.J. at p.795.

24 Ibid at p.795.

25 [1984] V.R. at p.634.

26 (1985) 59 A.L.J.R. at p.374.

27 [1985] 2 N.S.W.L.R. at p. 116, 137 and 145.

28 See Effron J., op cit. at p.9.

29 The question of the calculation of damages was not discussed at any length in *Ripka*. Damages awarded included all outstanding rents sought by the lessor to the date of notification of the repudiation to the lessee, and mesne profits until the date of the delivery of possession to the lessor. Damages in *Gallic* were determined on land law principles which permitted the lessor to recover all rent arrears and unpaid rents to the date of re-possession.

30 (1985) 59 A.L.J.R. at 376. In this case the lessor was awarded $85,000 for damages including damages for loss of the covenant to pay rent.

31 [1985] 2 N.S.W.L.R. per McHugh at p.146ff, for a discussion of the calculation of damages. Note Samuel J. (in dissent) holding that on the facts no repudiation had taken place. The lease to Insul Fluff amounted to a surrender and in consequence the lessee was only liable for unpaid rent to the date of re-possession by the lessor. The majority (Prestley and McHugh J.J.A. disagreed, holding that the lessees behaviour amounted to a repudiation and holding the lessee liable for damages equivalent to the rent unpaid between the lease to Insul Fluff and the lease to the subsequent company.

32 (1989) 52 S.A.S.R. 90.

33 (1985) 59 A.L.J.R. at 386.

34 [1985] 2 N.S.W.r.L. per McHugh J. at 146, where the acceptance of repudiation was communicated through the re-letting of the factory to Insul Fluff.

35 [1985 - 6] A.N.Z. Conveyancing Report at p.350ff.

36 (1986) 83 F.L.R. at p.38.

2.2

1 See *Davis Contractors Ltd v Fareham Urban District Council* (1956) A.C. 686.

2 *Cricklewood Property & Investment Trust Limited v Leightons Investment Trust Ltd* [1945] A.C. 221.

3 (1944) 68 C.L.R. 261.

4 Ibid, at p.302.

5 (1958) 76 W.N. at 48.

6 [1981] A.C. 675 at p.694.

7 (1985) 59 A.L.J.R., per Mason J. at p.378, per Deane J. at p.388.

8 (1985) 59 A.L.J.R. at p.383.

9 Sackville, R., op. cit.. This is the approach taken in the Victorian R.T.A.; see Sections 114 and 118.

10 See S.A. R.T.A 1978-81 S.71(1) which refers to premises which cease to be lawfully usable as a residence.

11 L.R.C. (Tas) Report No. 19, op. cit. at p.22.

2.3

1 *White and Carter Councils Ltd v McGregor* (1962) A.C. 413 where the House of Lords held that there is not duty of mitigation prior to acceptance of repudiation.

2 (1975) 5 A.L.R. 197.

3 In reaching the decision the court relied on the earlier case of *Boyer v Warbey* (1953) 1 Q.B. 234 in which Rolmer C.J. stated at p.247: "A tenant who goes out of possession without giving notice has no right to dictate to his landlord how he should deal with his property; and why the landlord should have disposed of the flat in a manner disadvantageous to themselves in order to save the tenant from the full consequences of his wrongful act, I am at a loss to conceive".

4 See L.R.C. Report No. 19 (Tas) at p.23. Sackville R. "Poverty and Landlord Tenant Law", Commission of Inquiry into Poverty A.G.P.S. 1975 at p.77; Bradbrook A, Property and the Residential Landlord Tenant Relationship, A.G.P.S. 1975 at p.16.

5 Bradbrook, A., ibid at p.16.

6 Bradbrook, A. "The Application of the Principle of Mitigation of Damages to Landlord Tenant Law", (1977) 8 Sydney Law Review 15 at p.17.

7 (1985) 59 A.L.J.R. per Mason, Wilson, Deane and Dawson J.J.

8 (1989) 52 S.A.S.R. 90.

9 Ibid at p.99. Bollen J. was critical of the narrow interpretation given to the ratio in *Progressive Mailing* by Priestly J. in *Wood Factory*. Bollen J. was of the view that the House of Lords in *Progressive Mailing* intended to speak more broadly in deciding that all the ordinary principles of contract law apply should apply in general to leases.

10 The argument put by Council for Vickers, which was accepted by Bollen J. was this: "... the absence of any suggestion of mitigation of loss in the Commercial Tenancies Legislation simply means that Parliament has not spoken on that area and left it to the relevant principles of contract law to take care of".

11 Although Bollen J. acknowledged the earlier Tribunal decision in *Pergoli v Ceczyncki* in applying a duty to mitigate, he did not place any weight on the decision because of the absence of cited authority in the judgement.

12 Bollen J. quoted at some length from Bradbrook's paper on "The Application of the Principle of Mitigation of Damages to Landlord Tenant Law" op. cit.

13 (1989) 52 S.A.S.R. at p.200.

14 Ibid at p.200.

15 Section 16 R.T.A. (1975) Queensland, Section 1061(e); R.T.A. (1980) Victoria.

16 Section 70(1) R.T.A. 1978-81 S.A.

17 Section 60 R.T.A .1978-81 S.A.

18 The reasons for this are perhaps no longer at relevance since the development in *Progressive Mailing* and specifically since the 1989 S.A. case of *Vickers*. Previously as discussed in Chapter 2, there was not duty on the plaintiff to mitigate his damage before there had been any breach which he accepted as a breach, i.e. the duty only arose if the repudiation was accepted. See *White v Carter (Councils) Ltd v McGregor* (1962) A.C. 413.

19 See Bradbrook, A., op. cit. p.135.

2.4

1 [1975] Q.B. 326.

2 Ibid at p.339.

3 Ibid at p.336.

4 *Blomley v Ryan* (1956) 99 C.L.R. 362 at p.405 (per Kitto J.).

5 The Australian Government Commission of Inquiry into Poverty, Law and Poverty in Australia, A.G.P.S. Canberra 1975 at p.57 identifies migrants, Aboriginals, single parent families, persons with disabilities, and persons in receipt of Unemployment, Sickness and Invalid Pension, as over-represented in private residential housing.

6 Effron J. "The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities". Monash University Law Review (Vol. 14, June 1988).

7 Bradbrook, A. Residential Tenancy Law and Practice in Victoria and South Australia, Law Book Company Ltd 1983 at p.124.

8 (1983) 151 C.L.R. 447.

9 (1988) 62 A.L.J.R. 110.

10 (1985) 59 A.L.J.R. 373.

11 Per Mason, Wilson, Deane and Dawson J.J. in *Progressive Mailing House v Tabali* (Supra); *Vickers & Vickers v Stichenoth Investments Pty Ltd* (1989) 52 S.A.S.R. 90, per Bollen J. at p.100.

12 The Bill has been the subject of criticism by industry interests because of the level of proposed penalties for breach of Section 52A. The Consumer Affairs Council has recommended maximum fines of $100,000 for industry breaches and $20,000 for individual breaches. Industry interest are campaigning to

reduce penalties to $1000 for industry breaches and $500 for individual breaches. The outcome of this will be known when the Act is expected to pass at the next budget sitting.

13 Useful guidance for drafting of criteria may be found in the *Contract Review Act (1980)* N.S.W. and generally in the American case law on the subject matter involving the Uniform Commercial Code.

2.5

1 (1843) 152 E.R. 693.

2 (1843) 152 E.R. 1114.

3 *Penn v Gatenex Co Ltd* (1958), 2 Q.B. 210, which limited the application of *Smith v Marrable* to situations where the defect existed at the commencement of the tenancy.

4 (1968) 1 N.S.W.R. 56.

5 [1977] A.C. 239.

6 (1984) 3 B.P.R. 97184.

7 Ibid at p.9274.

8 *Residential Tenancies Act 1980 (Victoria)* Sections 97 - 103; *Residential Tenancies Act 1978 - 1981 (South Australia)* Sections 22, 42 and 46.

2.6

1 [1937] 2 K.B., 283.

2 The decision in *Taylor v Webb* was supported in *Chatfield v Elmstone Resthouse Ltd* [1975] 2 N.Z.L.R. 269. Chernov argues however that it may be possible to construct a case for withholding rent in 2 circumstances; firstly as a deduction against the cost of repairs done by the tenant and secondly it is arguable that even if the covenants are independent, if the lessee is in breach of the covenant to pay rent, he may offset against the landlord's claim for rent, the damage to which he is entitled for breach of the repair covenant. See Chernov, A., Tenancy Law and Practice, Butterworths 1980, p.84

3 *Surplice v Farnsworth,* 135 E.R. 232; *Chatfield v Elmstone Resthouse Ltd*, [1975], 2 N.Z.L.R. 269.

4 [1924] V.L.R. 38.

5 [1963] N.S.W.R. 468.

6 Sackville, R., Commission of Inquiry into Poverty, "Poverty and Landlord-Tenant Law" at p.76, A.G.P.S. 1975. Sackville suggests a better approach is to provide specific remedies for tenants.

7 Law Reform Commission of Tasmania, Report No 19, p.23.

2.7

1 See Section 113 R.T.A. 1980 Vic.
2 See Section 135 R.T.A. 1980 Vic.
3 See Section 85 (1) R.T.A. 1980 Vic.
4 See Sections 36, 63 and 64 1978-81 R.T.A. South Australia.

2.8

1 *Shevill & Another v The Builders Licensing Board* (1982) 56 A.L.J.R. 793; *Ripka Pty Ltd v Maggiore Bakeries Pty Ltd* [1984] V.R. 629; *Progressive Mailing House Pty Ltd v Tabali* (1985) 59 A.L.J.R. 373; *Wood Factory Pty Ltd v Cynayne Pty Ltd* [1985] 2 N.S.W.L.R. 105.
2 *Vickers & Vickers v Stichenoth Investments Pty Ltd* (1989) 52 S.A.S.R. 90. Also obiter support in *Progressive Mailing* (Supra).
3 Bradbrook, A., op. cit.; Mackie K. "Repudiation of Leases". 62 A.L.J. 53; qualified support from Effron J., op. cit.
4 Mackie, K., op. cit. at p.62.
5 These include collateral warranties and specific defences related to unconscionability including "non est factum" and "contra proferendum".
6 (1986) 83 F.L.R. 31 at p.37.
7 Effron, op. cit. at p.103.
8 See Mackie K., op. cit. at p.63.
9 See Effron J., op. cit. at p.93ff and p.106ff.
10 Ibid at p.94.
11. To a large extent this has already occurred under the Residential Tenancies Acts in other states, where the doctrines discussed in this chapter have been included in a modified form to suit the residential tenancy context.
12. (1985) 59 A.L.J.R. 373 at p.388.

CHAPTER 3

STATUTORY AND COMMON LAW PRINCIPLES GOVERNING RESIDENTIAL TENANCIES IN TASMANIA

3.0 Introduction

In Tasmania, there is no unified body of legislation currently governing the landlord/tenant relationship. Some relevant legislation is to be found in the following Acts: *Substandard Housing Control Act (1973-5)*, *Landlord and Tenant Act (1935)*, *Conveyancing and Law of Property Act (1884)*, *Land Titles Act (1980)*, *Auctioneers and Real Estate Agents Act (1959)*, and the *Registration of Deeds Act (1935)*.

However, most of the relevant legal principles are based on the common law.

This chapter gives a summary of the major features of the law as it governs the relationship between the parties in Tasmania in 1989, and, discusses the general defects of the law as it operates in practice in this state. Reform options and considerations are briefly addressed in this chapter, but a more substantial consideration of the reform initiatives in other Australian jurisdictions, is contained in Chapter 6.

3.1 Agreements

3.1.1 Leases and Licences

A tenancy exists where a person (the tenant) pays money to another person (the landlord) for the exclusive right to occupy premises for a particular period of time (the

term). The emphasis on exclusive right to occupy means that boarders, lodgers and caravan park dwellers are not generally given tenant status, since the owner usually retains the right to enter part of the premises for which the occupant pays rent. A tenant may bring an action in trespass to protect the right of occupancy, whereas a boarder or lodger may not.

The common law has always distinguished between "leases" and "licences", but since Lord Denning developed a test based on "intention" rather than "exclusive possession",[2] the distinction has become problematic. Under the intention test, the existence of a right of exclusive possession is a necessary but not a sufficient condition to create a tenancy. In *Errington v Errington & Woods*, Lord Denning held that the test of exclusive possession was by no means decisive,[3] and that although a person let into exclusive possession is prima facie to be considered a tenant, this will not be the case if other indicia[4] negate this intention. In the Privy Council decision in *Isaac v Hotel de Paris Ltd*[5], Lord Denning again reaffirmed his view holding the circumstances in which the exclusive possession had been given might show that: "all that was intended was that the occupant should have a personal privilege ... with no interest in the land at all".[6] More recent support for the intention test is to be found in *Somma v Halzelhurst*[7] in which the agreement contained a specific clause regarding exclusive possession, which was included in the agreement to avoid application of the Rents Acts.

Adherence to the intention test by the English Courts has been criticised by legal commentators on the basis of judicial bias against English residential tenancies legislation. Bradbrook has suggested that one of the reasons that the English Court has embraced the intention test so enthusiastically[8] appears to be "the wide ranging statutory safeguards which some Judges regard as onerous and oppressive against landlords."[9] As the intention test requires evidence of intent to create the relationship of landlord and tenant, it is more difficult to satisfy, and in consequence it is far easier

for a court to reach the conclusion that the true nature of the relationship is one of licence rather than lease.

The Australian High Court has declined to adopt the intention test, preferring the view that the test of exclusive possession is the decisive one, ie possession of itself is a necessary and sufficient condition to create a tenancy. The major Australian case is *Radaich v Smith*[10], which involved a document creating, in substance, a relationship based on exclusive possession, but which referred to the parties as "licencee" and "licensor". In finding that a tenancy existed, the court held it was important to examine the substance rather than the form of the document.

The relationship between the "intention" and "exclusive possession" tests was discussed in the case, and an attempt was made by Taylor, McTiernan & Windeyer JJ[11] to reconcile the tests, despite the English view expressed in *Errington v Errington and Woods* and *Crane v Morris*[12] which suggested that the tests should be regarded as competitive or mutually exclusive. Menzies, J. was the only Judge to give unqualified support to the exclusive possession test.[13] Taylor, J. allowed for the possibility that exceptional cases could arise in when the exclusive occupation or possession could be granted without grant of a leasehold interest,[14] which would appear to suggest that the question of intention will shall be of direct relevance in some instances. Windeyer, J. attempted to reconcile both tests by treating intention as one aspect of the exclusive possession test, holding that:

> "whether the transaction creates lease or licence depends on intention, only in the sense that it depends on the nature of the right which the parties intend the person entering upon land shall have in relation to the land,"[15]

This leads to a somewhat problematic result, because if one gives an account of both tests in terms of the necessary and sufficient conditions for compliance, the tests

cannot be reconciled, for additional indicia other than exclusive possession will always be required to satisfy the intention test.

Subsequent Australian cases have reaffirmed the view that exclusive possession is the decisive test, providing endorsement for Windeyer, J.'s proposition that the question of intention is to be regarded as a subsidiary aspect of the exclusive possession test. In *Claude Neon v M.M.B.W.*[16], the owners of premises "leased" portions of an exterior hotel wall, for the purpose of erecting electric light signs. The building was acquired by the Board of Works who subsequently gave note to the companies that it planned to demolish the premises and required the signs to be removed by a specified date. The companies paid rent to the specified date, and complied with the order, claiming compensation. Although the documents were referred to as "leases", the Court held that whether the documents were in fact leases, was not a matter of terminology, but of substance, the essential question being "whether the substance and the effect of the documents in question was to grant the appellants a right of exclusive possession on any part of the corner hotel building."[17]

In the 1985 decision of the Supreme Court of New South Wales, in *Lewis v Bell*,[18] the document in question was described as a licence agreement. The case involved rent of a stable complex and staff living accommodation owned by the Australian Jockey Association. Following notice of termination the Association took successful legal proceedings to recover the premises. The defendant agreed that the document constituted a lease, which was not effectively terminated by the plaintiff's actions. In finding that document was not a lease, Mahoney, J. reaffirmed the decision in *Radiach v Smith* and *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*,[19] namely, that the decisive test is whether the grantee is given the rights to exclusive possession. Indicia of whether such a grant has been made will be the focus of the grant, and where this is not clear, when continued in the light of the whole agreement and its context, it becomes necessary to examine other

aspects of the transaction.[20] In considering the significance of intention, Mahoney, J. held that it is relevant to consider the intention of the parties at two stages.[21] The first stage is for the Court to determine from the words used in their context, the intention of the parties as to the granted rights. Having ascertained these rights on examination of the parties intention as to the nature of the relationship will be of relevance, although the significance is diminished.[22]

More recent developments in the English Courts now appear to be moving towards reaffirming the line of reasoning taken in *Radiach v Smith.* In the 1985 House of Lords decision in *Street v Mountford*[23] found that where a person is granted exclusive possession for a fixed or periodic term a consideration of a premium or periodic payment, the agreement is to be construed as a lease. The Court were however prepared to allow for the possibility of a small number of exceptions, where, for example:

> "the parties did not enter into a legal relationship at all, or whether the relationship between the parties was one of vendor and purchaser, investor and service occupier, or where the owner, or requesting authority had no power to grant a tenancy."[24]

In summary, under the exclusive possession test it appears that the intention of the parties remains a relevant consideration in construing the agreement to determine the nature of rights which the parties intended to create.

3.1.2 Fixed Term and Periodic Tenancies

A *fixed term* tenancy exists where the parties agree to rent the property for a fixed period of time, such as a year or six months. The tenancy automatically expires at the end of this period.

A *periodic tenancy* is one which has a recurring period, such as a week or fortnight, or month. Usually the period in the tenancy is the period of rental payment. The tenancy generally continues indefinitely but can be terminated at the end of any period, provided appropriate notice is given by either party. Most periodic tenancies are verbal.

3.1.3 Types of Agreement

Currently, tenancy agreements may arise in a number of ways:

(1) Deed:

This is a formal instrument "written on paper or parchment, signed, sealed and delivered to prove and testify the agreement of the parties"[25] The mutual promises of both parties are known as "covenants". It is not possible to register a deed in respect of a tenancy unless the duration of the tenancy is at a minimum three years and one day.[26] Therefore, most tenancies are not capable of registration under the Torrens system of land registration. In any registered memorandum of lease, certain covenants are implied by the *Land Titles Act*, including the obligation that the lessee is to pay the rent and to keep and return the premises in good and tenantable repair.[27] Additional powers are given to the lessor in respect of, inspection and enforcing repairs, and, in relation to, obtaining repossession of the premises in situations where the tenant has breached the covenant to pay rent for three months.[28]

(2) Oral Agreements:

In many instances, there is no written agreement between the parties to a tenancy contract. Nevertheless, such tenancies are valid, conferring on the parties the same rights and obligations as arising under the common law.

(3) Implied Tenancies:

The implication that a tenancy agreement exists will arise where there has been payment and acceptance of rent, despite the fact no written or oral agreement has been made. If the behaviour of the parties is such to suggest a tenancy arrangement exists, the court will usually find an intention to confer exclusive possession, and an implied tenancy will result. In "overholding situations" where the tenancy continues in possession and pays rent, after expiration of a fixed term agreement, the court will infer that a tenancy arises, because of the payment and acceptance of rent.

(4) Written Agreements:

Apart from oral tenancies, tenancies are generally created through written tenancy agreements, signed by both parties. There are numerous versions of such agreements, which include standard form leases produced by real estate agents, and "homespun" leases. Both the Consumer Affairs Council and the Tenants Union of Tasmania have "fair leases" available, which are designed to provide a fair balance in terms of the parties rights and obligations.

Under the *Stamp Duties Act, 1931*,[29] stamp duty of $20.00 is payable by the tenant within 30 days of execution of any lease agreement. An unstamped document is inadmissible as evidence, although it may, in the event of a court case, be subsequently stamped and become admissible.

3.1.4 Terms of Agreement

The position in law is that parties are free to negotiate the terms of their lease. However, the Honourable Mr Justice King has pointed out:

> "in most such transaction one party lacks the information, the business and legal acumen and economic strength to negotiate in any significant way".[30]

The basic terms of the transaction are generally imposed by the dominant party and for most tenants, the doctrine of freedom of contract means, in practice, the acceptance without question of the presented lease.

In the financial year 1987 - 88 the Tenancy Advice Service[31] dealt with 1107 problems of which 218 (19.7%) involved queries about the terms of the agreement.[32] (A category breakdown of problems is contained in the Appendices)[33] Many of these problems would not have arisen, or have been more easily resolved, had the law provided a much fairer set of principles regulating the relationship between landlord and tenant, and ensured that the rights and obligations, arising from these principles, were clearly spelt out to both parties.

Many of the disputes which arise over interpretation of tenancy agreements, involve leases which are poorly worded, and are, for the most part, drafted with the sole purpose of protecting the landlord's interests. The biased nature of these leases is apparent from merely a cursory glance. (A sample of these leases is contained in the Appendices at Appendix 2) Despite availability of the Consumer Affairs Council lease, most tenants continue to be required to sign leases which contain clauses that are onerous and unfair. The most glaring deficiency of these standard form and "homespun" leases are as follows:

- None of the appended leases place the landlord under any duty to do repairs. Most, in fact, require the tenant to maintain the premises.[34] There is not even a duty imposed on the landlord to ensure that the premises are fit for human habitation at the commencement and during the tenancy.

- The tenant's common law right to quiet enjoyment is curtailed by clauses permitting the landlord or agent to enter at all reasonable times. No period of notice is stipulated.[35]

- The right to "peaceable re-entry" (with all of its consequent problems such as "lockouts", and the threat of potential physical violence) is retained, and is exercisable for any breach, of the often trivial conditions placed on the tenant (such as to wholly maintain the television set). No time is allowed for the tenant to remedy any breach giving rise to forfeiture. One of the most disturbing clauses is to be found in 2 of the real estate contracts, and claims effectively to allow the landlord to commit physical violence on the tenant without liability for assault or trespass:

> "If the tenant commits a breach of, or fails to observe and/or perform any of the conditions or agreements, contained or implied in this agreement, or fails to pay the rent herein reserved as herein provided, whether formally demanded or not and not withstanding waiver of any previous breach, the landlord and/or his agent may re-enter upon the premises or any part thereof (and for such purposes may break open any inner or outer door or windows *without hereby becoming liable for damage, trespass or otherwise*), and expel and remove all persons therefrom, and the tenancy hereby created shall thereupon absolutely determine, and this agreement may be produced by the landlord or his agent as a notice to quit clearly given and expired."[36]

- In one lease the following clause appears, which effectively permits the landlord or agent to remove the tenants goods, for breach of any condition of the agreement (which includes adhering durex or stickers to the wall):

> "Should I breach any of these rules and regulations, I give the landlord permission to put my goods and chattels out of this flat without any prior notice and without any Court action taken."[37]

- Some of the appended leases contain oppressive and unconscionable obligations. One home-spun lease, for example, requires the tenant to obey

any unspecified future instructions from the landlord.[38] Even if it is arguable that such a clause is unconscionable, as most tenants are unaware of the general principles governing the relationship, the landlord is in a position often to be able to enforce unconscionable and unfair terms.

3.1.5 Reform Considerations

An examination of commonly used agreements clearly reveal that one party is subject to many onerous conditions, while the other is left relatively free from enforceable legal obligations. Legal commentators have put forward a number of alternative approaches to control the form and intent of residential agreements:

(i) Form Requirements

In brief, the suggestion here is that onerous terms be printed in large or conspicuous type and that the tenant indicates by signing that he/she has accepted these terms. It is not a favoured approach, because the tenant is still effectively obliged to sign the onerous terms and is still bound by them. In addition, such an approach would not help prospective tenants with language or literacy difficulties.

(ii) Unconscionable Contracts

The approach here would be to empower a Court to declare unenforceable any "unconscionable" terms. Although it is submitted that a tribunal should have power to declare unconscionable terms void,[39] merely declaring the terms a nullity will not protect parties from being misled by the existence of terms, which they do not know are unenforceable. More importantly, the effectiveness of the approach depends on the initiation of action by the tenant to take legal action to enforce their rights.

(iii) Mandatory Administrative Approval of Leases

This approach would require a mandatory administrative approval of all leases before they can be signed or enforced by the parties. Although the system has been introduced in several American jurisdictions, the problems are: firstly, that it would be administratively time consuming and cumbersome; secondly, disparities would arise over interpretation of the fairness of particular clauses (regionally and between administrative staff); and thirdly, such an approach would significantly add to the costs of administering the scheme.

(iv) Statutory Standard Form of Lease

This has been favoured by a number of reports.[40] Briefly, this alternative would involve introducing a standard form of lease to apply in all cases, which would be fair to both landlord and tenant. All existing standard forms of lease would become illegal, and persons entering into a tenancy agreement would be required to sign a statutory form.

Bradbrook, Sackville, and the Law Reform Commission of Tasmania, have pointed to the difficulties involved in drafting an all-embracing inflexible document, and suggests that it is both "impracticable" and "undesirable". It would be difficult to design one lease that would apply satisfactorily to all tenancies, (ie multi-tenanted apartments, high rise dwellings and individual premises) because of differing requirements. The argument is that too many unnecessary clauses for deletion would confuse the parties, and make the document difficult to read.

There is general agreement among Australian legal commentators[41] that any standard form lease should include the following:

(i) The landlord's obligation to provide and keep the premises in a state of structural repair.

(ii) The tenant's duty to keep the premises clean and repair damage exceeding fair wear and tear.

(iii) The taking and return of security deposits.

(iv) The landlord's obligation to provide a rent book and receipts.

(v) The tenant's right to assign or sublet.

(vi) The landlord's obligation to provide a tenant with a copy of the lease.

(vii) The tenant's right of privacy, and the landlord's right of re-entry.

(viii) A prohibition against changing locks or security devices without consent.

(ix) A prohibition against retaliatory eviction.

(x) The period of notice required for termination of leases and the grounds for which a notice can be given by the landlord.

(xi) The procedures required to forfeit a lease.

(xii) The notice required for rent increases to be effective.

(xiii) Proposed abolition of the right of the landlord to refuse to renew a lease without specified grounds.

(xiv) Applicability of the doctrine of frustration, and mitigation of damage.

It is submitted that provisions should be mandatory and contracting out should be prohibited. In addition, it is submitted that it should be an offence to insert, in any agreement, a term which is intended to exclude the effect of any rights or obligations under the Act.

In summary, it appears that the most satisfactory solution will be to require all written or printed leases to incorporate the standard terms which the legislation applies, but to leave the parties free to agree on other terms to be included in the lease. In any lease agreement whether written or oral, the rights and obligations imposed by the new legislation should become terms of the agreement.

3.2 Security Deposits

3.2.1 The Law

The *Landlord and Tenant Act (Tas.) 1935*, makes no specific mention of security deposits, and the situation in Tasmania is governed by the common law position. The essential features are as follows:

(i) In a periodic tenancy, or where the lease contains no specific provisions on the use of security deposits, there is no legal limitation on the use to which such monies may be put. Estate agents are however bound by Section 47 of the *Auctioneers and Estate Agents Act 1959* which governs the operation of trust accounts. Section 47(1) provides:

> "Where money is received by a licensee[1] for or on behalf of the client, the licensee shall cause the money to paid to the client or disbursed as he directs, and, until so paid or disbursed shall cause the money to be paid into a bank in the state to a trust account, whether general or separate, and retained therein."

(ii) There is some uncertainty as to the legal status of bond money paid to the landlord/agent. Sackville points out that the bond money is not generally regarded as being held on trust for the tenant, and consequently,[2] the tenant risks the loss of the money if the landlord, to whom the bond money has been paid, becomes insolvent.[3]

(iii) There is no legal limit on the amount of security deposit which a landlord can demand apart from that determined by the market. The average security deposit for a three bedroom house is generally between $350.00 to $600.00, but instances have been recorded of highly inflated security deposits.[4]

(iv) The landlord may retain all or part of the bond money to compensate for damage caused by the tenant and for rent owing. Where premises are let under a lease agreement the bond is held as security to ensure the tenant carries out his/her obligations under the lease. Therefore, bond money may be held to cover unpaid rent, the cost of repairing damage caused by the tenant, and money due to the landlord for other breaches of the agreement.

(v) If the tenant wishes to challenge the landlord's decision, the tenant must take the landlord to the Court of Requests (Small Claims Division).[5]

3.2.2 Assessment

(1) Use of Security Deposits During the Tenancy

A survey of 12 major real estate agents operating in Tasmania (1989) indicates:

- It is the practice of most real estate agents to pay the majority of security deposits received into a non-interest bearing trust account with one of the major banks.

- Special interest bearing trust accounts in individual names are established only if requested by the tenant. Some agents require consent of the landlord to open such accounts.

- Generally, real estate companies do not initiate the establishment of individual trust accounts unless the bond exceeds $500.00. In July/August 1989 the average bond for a three bedroom house was between $350.00 to $400.00.

- Only 3 of the agents surveyed established individual interest bearing trust accounts in relation to all tenancies, as a matter of regular practice.

It appears that no-one benefits from the current practices, except the major banks. Agents are required to pay bank charges and taxes to operate such accounts, and the value of the non-interest bearing security deposit to the tenant, diminishes during the tenancy, depending on the length of the tenure and the inflation rate.

(2) Return of Security Deposits

The current security deposit system has been identified as one of the major areas of exploitation in landlord/tenant relations,[6] and as one of the major causes of tenant dissatisfaction.[7]

Information on bond problems has been collated mainly from Tenant Advisory Services and various government departments with jurisdiction to investigate complaints in matters of consumer protection. It can be argued that statistics obtained by these agencies represent only a small fraction of people actually experiencing bond problems. Whether a person with a bond problem is likely to report his/her case, depends on a number of factors, including awareness of tenant rights, access to informed services and the willingness and determination to take steps to enforce legal rights through a system not noted for its ability to solve disputes either quickly or economically.

Statistics recorded by the Tenant's Union (Tas.) indicate that bond disputes constitute the major category of work undertaken by the Advisory Service, and in 1987/88 this service received 158 complaints that security deposits had been unfairly withheld.[8] In its report to the Law Reform Commission (March, 1977) the Union identified two basic problems with bonds: firstly, that the amount of bond money, demanded by

landlords and agents as bond security, was excessive, and secondly, that bond money was being withheld at the end of the tenancy for little or no reason. The Union reported that, to a large extent, disputes over bonds appeared to be the result of misunderstandings by both parties as to the purpose of bond money.[9] A number of tenants had been required to pay for damage inflicted by the previous tenants.[10]

In its 87/88 submission for funding, the Union reported that in most cases bond money was withheld because of a dispute over "fair wear and tear". In a number of cases, landlords attempted to use bond money to cover repairs to electrical items caused by a general depreciation of the item. A number of other landlords had verbally agreed to refund the bond, but subsequently, without reason, refused to deliver it. In many instances, bonds are withheld because the landlord uses bond money to employ cleaners to shampoo carpets and scrub walls in situations where the tenant has maintained the premises and there is no damage exceeding that of fair wear and tear.[11] Several disputes occurred when tenants moved in to filthy premises, but left them cleaner and in better repair than at the commencement of the tenancy. The tenants were then billed for minor defects by the landlord and for defects which were already present.[12]

Tasmanian statistics on the bond problems are supported by those in other states, gathered prior to enactment of legislative controls.

1. Victoria

Between March and May 1977, the Tenants Advisory Service recorded one thousand six hundred and twenty tenant complaints, of which 15.2% represented bond problems (ie approximately twenty complaints per week).[13] In addition, a number of agencies also received many complaints about bonds including the Real Estate and Stock Institute[14] and the Small Claims Tribunal.[15]

2. Western Australia

The Western Australian Law Reform Commission reported that although disputes over tenancy bonds were common, few court actions were commenced in respect of these. In giving evidence to the A.C.O.S.S. inquiry into poverty, the Council reported that:

> "In many cases, the owner refuses to inspect the premises when they are vacated, in others he inspects and declares them to be in good order, yet refuses to return the bond money. Tenants are often challenged to go to law to get their bond money back. Bond money is retained for repairs which are not carried out ..... Incoming tenants 'inherit' unrepaired damage against which bond money has been retained, and are charged with it when their tenancy ends."[16]

A study into the private problems of tenants in Perth, in 1983 found that although 90% of households surveyed had paid a bond, 44% had money deducted from their bond. 70% of those who had money deducted felt that it had been withheld unfairly. Two further problems identified by this study were: firstly, the length of time that tenants await return of the bond after terminating the tenancy - 40% waited for return from between one and four weeks, and a further 20% waited for return of their bond money for over one month; secondly, 64% of tenants were not paid any interest on their security.

3. South Australia

Investigations by the Consumer Affairs Branch (1974) indicated that at least 50% of tenant complaints in relation to the retention of bond money was clearly justifiable, and that landlords were rarely able to produce any real evidence that the retention of the bond money was justified.[17]

Other evidence concerning the magnitude of the problem has come mainly from surveys. The Fitzroy-Collingwood survey (a survey administered by the Fitzroy Ecumenical Centre in conjunction with Bradbrook, took a sample of 242 tenants), indicated, that out of a total of 85 tenants who had paid a bond under their previous tenancy, no fewer than 38% suffered some deduction, 21% received nothing, back at all. Of those who received nothing 23.8% believed they had been swindled. 42.9% of tenants who recovered over two thirds of their money thought they had been swindled, while all of the tenants who lost between a third and two thirds of their money, believed they had suffered an injustice.[18]

In discussing these statistics, Bradbrook comments:

> "The most obvious conclusion to be drawn is that there must be many instances where money is retained unjustifiably by the landlord, and that the next common form of abuse is in the case where the landlord makes a partial deduction between one third and two thirds of the deposit for what the tenant believes to be trivial reasons."[19]

3.2.3 Reform Options

(1) Abolition of Security Deposits

The Community Committee Report (Victoria) criticised a number of legislative proposals to regulate the bond system: for their failure to consider the most fundamental question, namely whether the system of paying bonds ought to be retained at all, however regulated.

The Committee argued that a bond system was in serious conflict with the objectives of a reasonable social housing policy for the following reasons:

1. Bonds restrict housing access for all people in financial difficulty. Research conducted by the Centre for Urban Research and Action, Melbourne, showed that 28.8% of tenants surveyed in Melbourne's western suburbs had been prevented from renting a house or flat because of the excessive amount asked for as a bond.[20]
2. Bonds are used as a form of discrimination to enable landlords to "filter" out tenants who are considered undesirable. Separated women with children, pensioners, students, etc., are examples of groups barred in this way.[21]
3. Bonds are a major cause of disputes and conflict between the parties. (See generally, statistics compiled by the Consumer and Tenancy Advice Services)
4. Legislation to control bonds will be complex and costly[22] and may be counterproductive.[23]
5. There is no evidence that bonds actually prevent damage or default by the tenant.[24] The amount of bond charged is inadequate to cover substantial damage.
6. The bond system keeps huge amounts of money held up unproductively, but if the money is used at all, it is the landlord who has the benefit and not the tenant.
7. There are often delays, even in States where legislative controls exist, in the tenant recovering bond money. Until a refund is obtained, many tenants are unable to pay the bond on new premises.
8. A bond system provides one party only with a self-help remedy. A tenant who wishes to recover bond money must initiate action in the Magistrates Court (Small Claims Division). Bradbrook also comments that at the hearing, the tenant as plaintiff is required to assume the burden of proof.

In summary, both the Victorian Community Committee and the Cabramatta Working Party agreed that, for the reasons listed above, the bond system should be abolished rather than regulated, although existing problems of an unregulated system could be

modified by more stringent controls. Essentially, the argument, advanced by groups arguing for the abolition of bonds, is that protection of the landlords risk should not be achieved at a disproportionate cost, in terms of civil rights and housing access.

(2) Legislative Control of Security Deposits

A number of writers, have argued for the retention of a bond system despite the problems listed above. Sackville, for example, argues that the landlord has a legitimate interest in insuring himself against losses, caused by tenants not paying the rent or misusing the premises.[25] Sackville argues that the landlord ought to be entitled to require the payment of a bond in order to provide a fund out of which justifiable claims against the tenant can be met. The alternative view, he maintains, leaves the landlord vulnerable against dishonest tenants. However, Sackville's argument really pertains to the protection of the landlord's interest, rather than to the retention of the bond system, for it can, and has been argued, that a bond rental insurance scheme would more economically and effectively protect the landlord's interest.

Other arguments for the retention of a bond system are:

1. The prohibition of security deposits might adversely affect the poorest or apparently disreputable tenants who would find it more difficult to obtain satisfactory private accommodation. In fact, when the Ontario Law Reform Commission recommended the abolition of bonds, they strongly suggested that the landlords should bear a greater responsibility for choosing "trustworthy tenants". Consequently, abolition of the bond may make it more difficult for people with children to obtain rental accommodation.

2. Prohibition may lead to an increase in the genuine cases sustained by the landlords. The effect would be a situation where careful and honest tenants are required to subsidise dishonest and careless ones, through possible rent increases.

3. Perhaps the strongest arguments for retention of the regulated bond system, requiring lodgment of monies with a residential tenancies tribunal, is one of collective tenant benefit. If surplus money, accrued as a result of investment, could be channelled into providing Tenancy Advice Services, or non-profit rental housing co-operatives or other innovative participatory housing schemes, it would be distributed far more equitably and productively among tenants.

Most Australian legislatures have favoured retention of the bond system, but introduced legislation which regulates the extent and use made of security deposits. In the 1970's, a number of Australian States (New South Wales, South Australia and Victoria) introduced legislation seeking to curtail some of the problems which had developed from the "freedom of contract" basis of the common law position. All legislation imposed restrictions on the amount and permissible use of security deposits. In some jurisdictions, as for example in South Australia, reform of the security deposit system was one aspect of a much more complex piece of legislation which conferred jurisdiction on a Residential Tenancies Tribunal to hear disputes across a range of landlord/tenant matters. Legislative controls have also been introduced more recently in Western Australia (*Residential Tenancies Act, 1987*) and in Queensland *(Rental Bond Act, 1989*).

A summary of the major legislative changes in relation to the security deposit system, which have been introduced in other Australian States, is contained in Chapter 6.

(3) Rental Housing Insurance Schemes:

The Tasmanian Law Reform Commission recommended possible further investigation of an insurance scheme as a constructive alternative to bonds. Because of the undesirable side-effects of the bond system, the Community Committee in Victoria argued that such a scheme would be more consistent with the objectives of sound housing policy. This view is supported in the Report of the Cabramatta Tenancy Working Party.

As a result of the process of compromise, which led to the development of the modified Bill in Victoria, under Section 70 of the Victorian *Residential Tenancies Act 1980*, the tenant has the choice either to pay a bond or an insurance premium. Gim Teh points out that where there is an option between the two methods of protection, it is easy for the landlord to covertly discriminate against the tenant who wants insurance. The need for a universal coverage for cost efficiency renders the "choice" option unworkable. Given the high administrative costs of the insurance scheme (owing to the low premiums and the high percentage of small claims), it would be more feasible if operated by only the one insurance company. The Community Committee recommended that such a scheme should be administered and underwritten by the State Government Insurance Office. (S.G.I.O.). The Committee suggested that the premiums should be fixed by the S.G.I.O. according to the annual rental, and where claims were made by landlords, premises would be inspected, if necessary, and claims assessed by S.G.I.O. officers, in accordance with the condition report.

The Liberal Government in Victoria however, left the development of bond insurance open to private companies. Only two companies developed Bond Insurance in Victoria and both appear to have been underwritten by Steeves Agnew and are currently no longer available. The objective behind a Rental Bond Insurance Scheme

is in part to increase housing access, and to decrease the costs of housing, particularly for the poorer people. An analysis of the scheme which operated in Victoria indicates a number of major problems, which would need to be examined in any proposals to put the rental housing insurance scheme option on the current reform agenda. These are:

(i) The maximum indemnity offered was fixed according to the monthly rental, ie if the monthly rental is $400.00 which constitutes the bond payable, the premium of a policy annually is $80.00 plus charges of $7.60. This appears to be a saving to the tenant until one calculates the long term costs. For example, if a tenant leases the premises for six years he/she pays an amount of $525.60. If the tenant occupies the premises for ten years he/she will pay $876.00 in non recoverable premiums. In the long term the cost becomes astronomical, particularly as premium costs are likely to increase annually. Furthermore, Victorian policies make no reduction possible for no-claim bonuses.

(ii) Under the Victorian legislation, the Tenant insured against the owner's risk of damage to property. Many landlords were already insured for damage to property and it would have been far more efficient for the landlord to have insured against the possibility of damage being done by tenants.

(iii) Section 5 of the policy provided that in the event of termination of the Tenancy Agreement before the expiry date, the insurers would not be liable to refund any part of the premium paid for the insurance. However, in the case of periodic tenancies, tenants may be faced with having to pay premiums six times during one year (depending on notice to vacate reasons) or twice a year. Presumably, even if a tenant is granted premature termination of a lease by the Tribunal, he/she will not obtain a consequent refund of the premium.

The Community Committee in Victoria undertook some preliminary work to assess the feasibility of a bond insurance scheme. The Committee estimated the premium payable by examining figures for bond retention, as estimated by the R.E.S.I., as well as the amount of money paid out for property damage. Spreading this amongst all tenancies, the Committee estimated a premium of $9.50 in 1979 allowing for administrative costs. The Committee suggested that a tenant should not be expected to contribute more than half of this, and that if a more detailed analysis indicated a higher premium needed to charged, the State or Federal Government ought to be prepared to subsidise the scheme. With respect to risk covered, the Committee recommended that the proposed insurance should cover costs of damage up to an amount equivalent to four week's rent. Further, that the premium would not cover default in rent payments. A landlord wanting to insure his/her property against a greater amount of damage should be entitled to do so, but the Committee argued this should not be paid by the tenant or subsidised.

In 1977 the Community Committee and the Centre for Urban Research received a research grant from the Australian Housing Research Council to investigate the feasibility of the rental housing scheme in detail. Calculations done by the research group indicate that, on 1978 figures, the annual premium cost per dwelling, for a comprehensive scheme giving $200 cover, would be $4.66. No recent research has been undertaken on the current viability of a rental bond insurance scheme.

In order to provide a viable cost-effective scheme, it appears that any scheme would need to be state-controlled and mandatory in order to spread costs and keep premiums low. The schemes which were developed in response to the Victorian legislation do not accord with the objectives of sound housing policy, and it is submitted that any proposal to introduce this scheme here, would need to be subject to rigorous economic analysis.

3.3 Security of Tenure

Security of tenure is probably the most important right of all to tenants. It is fundamental to the concept of a right to housing. Without it any other reforms benefitting the tenant are worthless, as a landlord can simply evict any tenant who seeks to enforce their rights or can evict the tenant indirectly by rent increases if these are not regulated.

It is fundamental to any system of security of tenure that eviction must be justified on "good and reasonable" grounds, ie a tenant's home should be secure from the whims of the landlord. This is not the case at present.

The situation in Tasmania can be summed up as follows:

(1) In respect of periodic tenancies, a tenant can be evicted provided that he/she is given a period of notice based upon the period of the tenancy, which is usually calculated by how often the rent is paid. As most periodic tenancies are fortnightly or weekly, this entitles the landlord to evict at insufficiently short periods of notice, which make it difficult for the tenant to relocate. Some measure of protection is given under written and fixed-term leaseholds where the tenant cannot be evicted unless he/she has breached a condition of the lease or unless there is a specific clause which gives right to either party to terminate the lease before it expires.

2. There are no requirements for the landlord to give "just cause" as to why he/she is evicting a tenant provided the tenant is given the requisite period of notice. This is so, regardless of the length of time the tenant has occupied the premises. The only controls on eviction in Tasmania exist in the *Substandard Housing Control Act* and are confined to "controlled" premises.

Assessment

Eviction cases contribute a large proportion of the work undertaken by Tenancy Advice Service[1] and evidence suggests that failure to require landlords to show "just cause" in relation to eviction has led to some disturbing abuses. Landlords evict tenants who have made improvements to premises in order to increase the rent, tenants have been threatened with eviction for repulsing sexual advances and other tenants have been evicted for failure to undertake repairs or for requesting that repairs be done. Summary evictions occur for rent arrears of less than a week.

In specific situations, both fixed term and periodic tenancies can be terminated for breach by the tenant (forfeiture), before the end of the term, or the period of notice in respect to a periodic tenancy. An examination of current tenancy agreements indicate that many of the tenants' obligations are expressed so that breach of any of them justify termination.[2] The consequence of the actual eviction notice for a tenant and his/her family may be very severe, including the prospect of homelessness or crisis housing in a refuge.

Reform Considerations

The present law is based on the philosophy of freedom of contract, which holds that the tenant is entitled to no greater period of notice than he/she has negotiated in the lease.

Reform in other Australian jurisdictions has departed almost totally from the common law position. In each state, legislation sets out substantially new rules as to the period of notice which must be given before the agreement can be brought to an end.[3]

In each state, legislation aims to balance the competing interest between the parties; namely the landlords need to protect his/her reversionary interest and to regain possession in specified circumstances on the one hand, and the tenants need for general and ongoing security of tenure on the other. There are clearly circumstances in which the law should enable a landlord to recover possession quickly (such as where the tenant causes wilful or intentional damage, or if the premises become inhabitable). On the other hand, where a landlord has legitimate interest in seeking eviction of the tenant, the law should protect the tenants security of tenure.

Specific key issues which need to be addressed in any reform proposals are:

(i) The period of notice a tenant is entitled to expect he/she to receive in situations where there has been no breach of contract.

(ii) The period of notice the tenant should be required to give, to terminate the tenancy.

(iii) Whether a fixed term tenant should have a statutory right to renew the tenancy, unless possession is required by the landlord in accordance with prescribed grounds.

(iv) The grounds for terminating a tenancy (fault and non -fault), and the period of notice reasonable to stipulate in relation to each ground.

(v) A prohibition on retaliatory eviction.

(vi) Specific processes necessary to recover possession (abolition of current self-help "right of re-entry" measures).

The specific content of each of these issues is discussed in Chapter 6 which provides an overview of legislative reform in other Australian states. Specific recommendations on security of tenure are contained in Chapter 7.

3.4 Quiet Enjoyment and the Landlords Right of Entry:

3.4.1 Covenant for Quiet Enjoyment

The situation in Tasmania is governed by the common law which provides:

(1) That every tenant is entitled to the benefit of a covenant for quiet enjoyment.[1]

(2) Where the covenant is not expressly contained in the tenancy agreement it is to be implied.[2]

Reference is made to the covenant for quiet enjoyment in the second schedule (Part II, Section 12) of the 1935 Landlord and Tenant Act.[3] Neither the express or the implied covenant however is absolute. Operation of the covenant has been qualified by the common law in respect of third party interference, authorisation, direct and physical interference, and restrictions on the use of property.

Authorisation

A landlord is not liable for interference caused to the tenant by any person claiming against the landlord. In *Stanley v Hayes*[4], the tenants claim for breach of the covenant for quiet enjoyment was rejected, in a situation where a third party (namely a debt collector) entered the rented premises and seized the landlords goods, because the landlord failed to pay his land taxes.

Direct and Physical Interference

The issue here is whether the covenant can be breached if the interference by the landlord is not of a direct and physical kind. Early cases such as *Brown v Flour*,5 required the proof of physical interference. However in *Owen v Gadd*,[6] the Court

of Appeal, while still requiring substantial physical interference in this particular case, scaffolding outside the tenanted premises), removed the requirement of an actual physical interruption onto the premises. Later in *Kenny v Preen*[7] the requirement of actual physical interruption were removed and a breach of the covenant was found to have been satisfied by the writing of threatening letters and the persistent knocking on the tenants door.

The Australian case law is a little unclear on this issue, but it seems that, in order for the tenant to establish breach of the covenant, he/she needs to show (1) that there has been an interference and, (2) that the interference has effected enjoyment of the premises.[8] The South Australian case of *J.C. Berndt Pty Ltd v Walsh*[9] supports a broad view of the definition of physical disturbance.

Third Party Interference

Sanderson v The Mayor of Beswick on Tweed[10] was the first English case to establish the principle that, if the tenant can show the landlord authorised or actively participated in the wrongdoing of a third party breaching the covenant, the landlord will be liable under the covenant.[11] The doctrine however appears to be fairly narrowly construed.[12] In general, it appears that the landlord will only be liable to one tenant for the unlawful act of another tenant, where it can be proven that he has authorised or actively participated in the unlawful act causing the disturbance, or where it can be shown that he let the premises for a purpose which necessarily involved a nuisance.

Restriction On The Use Of Property

The common law does not view restriction on the use of property as a breach of the covenant for quiet enjoyment.[13] Consequently, if the premises become uninhabitable

due to repossession, the tenant cannot sue for breach. For example, if a notice of intention to declare a house substandard was issued under Section 4 of the *Substandard Housing and Control Act (Tas) 1973*, and a further order for substantial repairs was issued under Section 18(1)(a) requiring vacation, the tenant could not seek compensation for a breach of the covenant.

Subject to the above restrictions, the landlord is liable for damages if he/she breaches the covenant, and a tenant may seek an injunction to prohibit any further breaches. Alternatively, the tenant may frame an action in nuisance or trespass. In respect of nuisance, a landlord will be liable when he/she expressly or impliedly authorises another tenant to create a nuisance, or when a nuisance is certain to result because of the purposes for which the adjacent premises are let.[14] In respect of framing an action in trespass, the tenant must show direct interference with the land which results from the landlords entering or remaining on the land or placing or projecting an object onto the land.[15] However, even where there has been substantial interference, if it does not involve actual physical interference, a trespass action will not succeed.[16] Courts have more recently shown a willingness to award exemplary damages against the landlord for employing harassing techniques, but subject to the condition that the tenant is able to prove an action in nuisance or trespass.[17] However, exemplary or aggravated damages will not be awarded for breach of the covenant for quiet enjoyment, even when the behaviour constitutes harassment.

3.4.2 Landlords Right of Entry

Under common law, the landlord has no right to enter the dwelling during the tenancy. In respect of a periodic oral tenancy, the common law position prevails. One exception arises in respect of premises subject to a tenancy agreement in which the landlord is under a duty to repair. An implied covenant arises in which the tenant is taken to permit the landlord to inspect the premises at any time to view the state of the dwelling.[18]

If the agreement is registered under Section 64 of the *Lands Titles Act, 1980* (any lease for a term of 3 years or more is registable),[19] and the contract does not provide otherwise, the landlord has specific rights of entry in addition to his/her common law rights. Section 67 of the *Land Titles Act* provides for two implied covenants:

(a) "The lessor may by himself or his agents, at all reasonable times, enter upon the demised property, and view the state of repair of the demised property and may serve upon the lessee, or leave at his last or usual place of abode, or upon the demised property, a notice in writing of any defect requiring him, within a reasonable time to be specified in the notice, to repair the demised property.

(b) Where the rent or any part of the rent is in arrears for three months, or where a default is made in the fulfillment of any covenant, whether express or implied in that lease, on the part of the lessee, and is continued for three months, or where repairs required by the notice referred to in (a) have not been completed within the time specified in the notice, the lessor may re-enter upon and take possession of the demised premises."

These covenants appear to be designed predominantly for the purpose of protecting the interests of the landlord, rather than the tenant. However, it would appear that the number of residential tenancies agreements affected by this section is comparatively small, because most agreements are entered into for a term of one year or less.

Several other covenants relevant to the landlords right of re-entry are contained in the *Conveyancing and Law of Property Act, 1884.* The interest of a tenant in possession is expressly protected under Section 11 against defeat by purchasers or other persons with a reversionary interest. Section 11 provides that the obligation of the lessors covenants run with the reversion, and it would therefore appear to make registration of leases unnecessary. Section 15(1) would also appear to place a restriction on forfeiture for breach of covenant, by requiring the landlord to serve notice specifying the particular breach complained of, and providing opportunity for

the tenant to remedy the breach or pay compensation, before exercising any right or re-entry. It is significant that the Act also provides that the provisions of Section 15 should apply to all leases, notwithstanding any stipulation to the contrary.

Most leases provide generously for the landlord's right of entry and it is usual to find a clause in most contracts in which the tenant agrees to "permit the landlord or his agents, workmen or prospective purchasers or tenants, at all reasonable times to enter upon the premises and inspect the conditions."[20]

3.4.3 Assessment

Neither the common law nor the covenants implied by statute, nor the usual express covenants in an agreement, achieve a fair balance between the rights of the tenant and the landlord. Yet is is fundamental that the tenant should be secure against unauthorised entry, or entry without notice by the landlord or agent.

The current remedies do not provide the tenant with any real form of redress for a number of reasons.

- The remedies of breach of covenant, nuisance or trespass are generally impracticable due to the legal expense involved.

- Qualifications on the operation of the action (such as the requirement for actual physical interference in any trespass action) limits the application of the possible tort remedies.

- In some situations, involving trespass, there will be difficulty in proving actual damages occurred, despite a substantial invasion of privacy. Therefore, although a tenant may succeed in an action for breach of the

covenant, the Courts will generally not award exemplary or aggravated damages for such a breach.

- If the tenant does not have any security of tenure through a fixed term agreement, retaliatory eviction is a possible and likely consequence of initiating any legal action, in respect of breach of the covenant for quiet enjoyment.

- Current remedies against a landlord who interferes with essential services to the household (such as electricity etc) are inadequate. The only available remedy for the tenant is to sue for breach of the covenant for quiet enjoyment. The remedy is no real deterrent against unscrupulous landlords as it is a financially and inaccessible option for most tenants.

- Breach of the covenant for quiet enjoyment does not entitle a tenant to terminate the lease. In cases where the harassment results from behaviour which is calculated and continual, termination of the tenancy will often be the tenants preferred option. This produces the absurd result that a landlord may harass or intimidate a tenant by withdrawing services in the hope he/she will quit the premises, and if this occurs, the landlord can subsequently sue for breach of the covenant to pay rent.[21]

3.5 Rent Control and Rent Increases

3.5.1. Rent Control

Fundamental to the nature of the landlord - tenant relationship is the payment of rent. The amount of rent paid by a tenant is, under our law, a matter of contract between the parties. In practice, rents are generally set at "what the market will bear".

Accordingly, rents reflect neither equitable payments for social necessity (housing), nor a socially agreed upon formula for return on capital to investors in the housing market. A number of alternative systems of rent control have been developed in overseas jurisdictions.[1] Often rents have been controlled during times of civil emergency to prevent profiteering,[2] sometimes rents have been controlled where premises are substandard (*Substandard Housing Control Act*),[3] and, occasionally, rents have been controlled because of deliberate political intervention by reforming governments seeking to protect the interests of the generally poorer sections of the community.

Reform Consideration

Most major reports have argued for a system of selective rent control, rather than general rent control legislation.[4] There is prolific material on arguments both for and against comprehensive rent control legislation in other jurisdictions.[5] The evidence from such research is inconclusive and contradictory, on the general effect of such legislation on the total supply of rental housing stock. The arguments for and against such legislation are not canvassed in this report, because it is unlikely that the government would give any serious consideration to a comprehensive rent control option on its current reform agenda.

The general principles governing a selective rent control system have been discussed by most of the major reports. The Law Reform Commission of Tasmania recommended a 3 tier rent control structure, with controlled rents for housing unfit for habitation and substandard housing. The Commission recommended that above standard accommodation should be free from any controls, subject to the tenant's right to appeal against harsh or excessive rent.[6] There is general agreement by most legal commentators that the need exists for a selective system of rent control to prevent exploitation of tenants by excessive rent demands.[7]

In order for rent control legislation to work effectively, it needs to strike a balance between protecting tenants from excessive rent and permitting the landlord a fair return on his/her property investment.

Bradbrook recommends that all existing legislation should be repealed and that new system of selective rent control should be established which would:

(i) Apply uniformly in all states.

(ii) Be simple to administer.

(iii) Provide adequate protection to tenants against excessive rent increases.

(iv) Apply equally to all rented premises.

(v) Adopt fair rent principles in assessing rents, based on current market values.

(vi) Place the responsibility on a government department for instituting and prosecuting an application for rent reduction. The suggestion here is that on complaint an inspection would be made, and if the complaint is justified, then the nominated department would be able to bring an action to reduce the rent.

(vii) Allow determinations to apply for a fixed period, regardless of whether there is a change of tenants.

Details of a proposed system for Tasmania are outlined in Chapter 7.

3.5.2 Rent Increases

The major principles governing rent increases can be briefly summed up as follows:

(i) In the case of fixed term tenancies, the landlord is entitled to increase the rent without notice by an unlimited amount at the end of the fixed term.

(ii) In the case of periodic tenancies, the tenant is entitled to a clear period of notice, dependent on the duration of the rental period. Therefore, a weekly

tenant is entitled to one weeks clear notice, and a fortnightly tenant is entitled to one fortnights notice.

(iii) There are no legal restrictions on the amount of the increase which can be legitimately requested of the tenant, nor of the frequency of such increases, unless the agreement provides otherwise.

In July/August 1989 the average rents in the private sector Hobart were: for a three bedroom house, $144.00; for a two bedroom flat, $110.00; and for a one bedroom flat, $79.00. In respect of a supporting parent with two children rental payments in respect of a three bedroom house amount to 81% of the Social Security Pension. A table of average rentals for the Hobart area relative to income source from a range of pension and benefits payable by the Department of Social Security, is contained in Appendix 5. In view of the extreme monetary restrictions on much of the tenant population, it is important to ensure some measure of control over the frequency and maximum rates of permissible rent increases.

Reform Considerations

Two major problems arise with the current law:

(i) The period of notice required by the common law is insufficient to give a tenant time to locate alternative accommodation. Bradbrook recommends:

(1) That the minimum notice period for a rental increase should be three months.

(2) That rent increases should be illegal during the first six months.

(3) That rent increases should be limited to a maximum of two per annum.[8]

(ii) The question of whether the maximum amount of rent should be limited is problematical. Rent regulation legislation was introduced in New Zealand in the 1970's but subsequently discontinued. Under the New Zealand legislation a tenant could apply to the Rent Review Authority for a determination that a rent increase was unjustified. The grounds in which a rent increase could be sustained were either that expenditure on the premises had increased or the furniture or chattels had been improved.

The favoured approach appears to be deal with excessive rents indirectly by permitting the tenant to challenge the rental amount in situations where the tenant believes the rent is excessive. The general principles of such a system are set out in Chapter 7.

3.6 Repairs and Maintenance

3.6.1 The Law

With the exception of the *Substandard Housing Control Act (1975)*, and specific tenancy agreement to the contrary, the legal position regarding repairs is governed by the common law, which imposes no obligation on either the landlord or the tenant to repair the premises. Therefore, a tenant cannot compel a landlord to undertake repairs, unless the landlord has agreed to do so. The only exception to this, is in the case of furnished premises,[1] where the landlord must ensure they are fit for habitation at the commencement of the tenancy, but there is not continuing obligation to maintain them in a habitable condition, or to repair and subsequently occurring defects. In respect of unfurnished houses there is no obligation on the landlord at common law to ensure they are fit for anything.[2]

The principle adopted by the law in regard to habitability is that of "caveat emptor". (let the buyer beware). Under this principle, an assumption is made the the prospective tenant (like a buyer of goods) has examined the premises and has agreed to rent them notwithstanding any noted defects.[3] The principle then transfers the risk of quality to the tenant, excluding any remedy in respect of defective premises. It is irrelevant that the tenant may not have been able to examine the premises, or may not have noted a less obvious defect.[4] The fact that a tenant, through necessity, may be forced to rent such defective premises, does not affect the operation of the principle at common law.

There are two exceptions modifying the general common law position:

(1) Where tenancy agreements contain an express agreement as to responsibilities associated with repairs.

(2) Requirements imposed in regard to the standard of dwellings contained in legislation, such as the *Substandard Housing Control Act* and in local council bylaws.

In respect of the first of these, parties to a tenancy agreement are free to allocate responsibility for repairs as they see fit. Most standard form leases however impose a condition on the tenant (which exceeds the common law position), to maintain the premises in good repair, and to deliver up possession of the premises at the end of the tenancy in good and tenantable repair. (Subject only to the exceptions of damage exceeding fair wear and tear, or damage caused by fire, storm or tempest or other acts of God).

The extent of the tenants obligation will be dependent on the precise wording of the condition. The following are examples of repair covenants commonly placed on tenants in currently used agreements:

(a) "To keep all glass in window frames and keep same clean and all shutters locks and fastening bells, doors and internal fittings and fixtures in good and tenantable repair."

(b) "The tenant shall at their own expense keep the yard, outbuildings, sinks, drains and W.C.'s clean and free from rubbish and shall keep all chimneys properly clean."

(c) "The tenant will make good repair or restore (at the option of the landlord) to pay for all such articles of furniture as shall be broken, lost, damaged or destroyed during the said term."

Even if the tenant has not covenanted to repair the premises, the courts will usually find an implied covenant that the tenant has agreed to use the premises in a tenant like manner. This includes an obligation on the tenant not to commit waste,[5] and generally constitutes a requirement as to the tenants conduct, rather than to a specific obligation to repair. All tenants are liable for voluntary waste, such as a deliberate act causing damage, but liability for permissive waste is dependent on the nature of the tenancy. The common law position seems to be that monthly or weekly tenancy are not liable for permissive waste,[6] but tenants for a term of years are liable for permissive waste.[7] The position regarding year to year tenancies is unclear.[8]

Specific statutory obligations are prescribed in Section 66 of the *Land Titles Act (Tas.) 1980* in respect of leases exceeding three years. Section 66 creates an implied covenant that the lessee:

> "Will keep and yield up the demised property in good and tenantable repair, damage by fire, storm and tempest, act of Her Majesty's enemies, and reasonable wear and tear excerpted."

3.6.2 *Substandard Housing Control Act 1973-5*

The *Substandard Housing Control Act* was introduced in 1973.[9] The intent behind the legislation was to improve the quality of rental housing stock in the state by:

"making provision for the control of rents payable in respect of certain substandard housing and for matters connected therewith."[10]

Despite initial parliamentary debate over whether the act would bind the crown,[11] government housing department tenancies and other departmental housing is excluded under the act. Presumably, inclusion of housing department tenancies would create a conflict of interest, due to the fact that the Director-General of Housing has primary responsibility for implementing the legislation.

The main features of the Act can be set out as follows:

(i) Under Section 3, regulations have been prescribed,[12] setting out minimum standards in respect of habitation, including construction, state of repair, drainage, protection from damp, facilities, sanitation, ventilation, lighting and vermin infestation.

(ii) Where the Director-General of Housing is satisfied that a house does not conform to the prescribed standards, a "notice of intention to declare the house substandard" may be issued in writing on the interested parties:

(a) Specifying work or other aspects of repair that need to be carried out.

(b) Fixing the maximum rental payable in respect of the premises. The rent may in the initial instance be controlled for six months.

(iii) Under Section 4(6), the owner has thirty days to carry out the need repairs, or to negotiate an extension with the Housing Department. From the time the notice is issued the house becomes "controlled" (S.5), and the Director-General has power under Section 8B, to establish the maximum weekly rental payable. It is an offence under Section 12 to demand or receive excess rent. The Director-General may also direct that the maximum rental fixed under the

Act, in respect of the tenancy, be shown prominently displayed on the notice affixed to some part of the premises subject to the tenancy.[13]

(iv) If the owner fails to make arrangements in respect of the repairs, the Director-General may declare the premises substandard, and issue a certificate which is given to the Recorder of Titles.

(v) The Act contains a number of security of tenure provisions, which place limitations on orders for possession, in respect of controlled houses. A notice to quit given by the landlord is of no effect, unless the landlord can prove to a court that one of the following seven prescribed contingencies has occurred:

(a) The tenant has contravened or failed to comply with any of the terms, or has damaged the premises, committed a nuisance or has used the premises for "immoral or unlawful purpose".
(b) The tenant has sublet or taken in lodgers to make a profit.
(c) The premises are required by the landlord's family.
(d) It is necessary for an employee to occupy the premises.
(e) A contract for the sale of the house was entered into before the house became controlled.
(f) The tenant has already given a notice and the landlord has made arrangements to relet.
(g) The possession is reasonably required for substantial alterations, reconstruction or demolition.

(vi) Once premises are declared "controlled", even if the repairs are undertaken and the premises are brought up to standard, the premises remain controlled for a further period of six months, or until the tenant vacates the premises (of his own volition).[14]

3.6.3 Assessment

The following table provides a brief guide to the operation of the Act over the last four financial years.

OPERATION OF THE *SUBSTANDARD HOUSING CONTROL ACT* (TAS) 1973-5 DURING THE FINANCIAL YEARS 1985, 1986, 1987, 1988.

(Source: Annual General Reports, Department of Housing and Construction)

Financial Year		1984-5	1985-6	1986-7	1987-8
(i)	Dwellings inspected	147	147	176	55
(ii)	Notice of 'intention' given	6	15	17	20
(iii)	Appeals	-	-	-	-
(iv)	House declared substandard	-	-	-	-
(v)	Extension requested by owner	6	15	17	20
(vi)	Maximum rent set	-	-	-	-
(vii)	Maximum rent varied because of improvement	-	-	-	-
(viii)	Notice of intention withdrawn	4	8	17	5
(ix)	Notice of cancellation	5	3	3	-
(x)	Houses demolished	-	-	-	1
(xi)	Houses put to other uses other than dwellings	-	-	-	-
(xii)	Total houses subject to H.D. control	90	93	92	95

In interpreting the figures, the following points should be noted:

(i) The sharp decline in the number of inspections in the last two years is attributable to the production of a departmental form, which requires tenants

to outline the nature of the problem, prior to making a departmental decision to inspect.[15]

(ii) A distinction is made between formal and informal notices. An informal notice is sometimes issued when the repairs, although causing inconvenience, may not, in the opinion of the inspector, be such as to contravene regulations made under the Act. There is no statistical record of such notices.

(iii) Under Section 8 of the Act, an aggrieved person may lodge an appeal in respect of: (1) service of a "notice of intention", (2) the refusal of the Director-General to withdraw a "notice of intention", or (3) the refusal of the Director-General to issue a certificate declaring that a house has ceased to be substandard. There have been no appeals lodged in the last four years and, in fact, only one appeal has ever been lodged under the Act.

(iv) Virtually no houses are declared substandard under the Act.

(v) All of those who receive notices apply for an extension. This is generally because formal intervention is only made following investigation where the premises are clearly in breach of regulations. In such situations, the repairs are often substantial and long term reconstruction is required.

(vi) The maximum rent provisions have not been used in the last four years. Bradbrook points out that the rent control sanction cannot be a totally effective remedy against substandard housing, because, by definition, it can be only be applied to premises occupied by tenants, and, therefore, is totally inappropriate in the case of owner-occupied dwellings.[16] Despite this limitation, it is submitted that there may well be opportunity for the Department to use its powers under the Act, to reduce the current number of

houses subject to control. According to the Annual General Report for the financial year 1988-89, there are still 95 houses subject to Departmental control.

(vii) Because the maximum rent provisions have not been used, there has been no scope for the Department to encourage the upgrading of rental housing stock through using rent incentives. It was intended by the legislature that rent control sanctions would be instrumental in securing the "upgrading of slums",[17] yet, use of the rent control provision by the Director-General of Housing has been virtually non-existent.

(viii) The table indicates marked differences in the response to "notices of intention" over the review period. In 1987, for example, 17 notices of intention were issued and 17 were withdrawn. However, in 1988 out of 20 notices of intention that were issued, only 5 were withdrawn.

(ix) Only a few notices for cancellation are issued in each financial year. There is no regular review of houses subject to control, although it is possible to infer from the minor movement in total houses subject to control, that of these, only one or two are removed from control annually.

(x) Only one property as been demolished, (for a car yard) in the last four years.

(xi) There are no records kept of houses which are converted to use other than residential dwellings. In assessing operation of similar legislation in South Australia and Victoria, Bradbrook has expressed some concerns about the effectiveness of the rent control sanction in these states in improving the quality of housing. In analysing the figures from South Australia,[18] he concludes: "the aim of the trust in applying the rent control sanction (to

improve the quality of housing stock), thus misfires badly when the effect of the sanction is to cause the owner to cease using the house as a dwelling."[19]

(xii) The total number of houses subject to Housing Department control has virtually remained the same over the last four financial years. The premises subject to control in 1989 are in fact the same premises as subject to control in 1986.[20]

3.6.4 Discussion

Substandard housing legislation in other States has not worked well in practice. Two major problems have emerged:

(1) The length of time taken for the legal machinery to work before the premises are repaired, which includes significant delays in a number of stages in the enforcement procedure.[21]

(2) The rent control sanctions, by themselves, appear to have been insufficient to ensure repairs, owing to the increasing capital value of the land and the relatively insignificance of the rental income to the owner. Bradbrook recommends the inclusion of an effective power to enforce repairs, as an addition to the rent control sanctions.[22]

There are several recommendations which may improve the effectiveness of the legislation in Tasmania:

(1) It appears that, in general, the Director-General of Housing has required an accumulation of defects, the breaching of the regulations or a substantial defect before formal action will be taken. It is submitted that, if a less restrictive interpretation of the regulations were permitted, or more

comprehensive and precise regulations were re-drafted, the possibility for formal intervention would widen and the effectiveness of the Act in upgrading housing stock more readily would improve. It would also significantly assist tenants who have minor repair problems which are causing inconvenience, but which are not presently covered by the regulations.

(2) It becomes clear, from the table, that more resources are needed to:

(a) Allow inspectors to follow up on houses subject to control, and to carry out a more adequate enforcement program.

(b) To establish a database system, which records all aspects of the operation of the Act, and through which the Director-General of Housing can monitor the effectiveness of the Act, and provide a regularly updated account of the state of houses, subject to its control.

3.6.5 Reform in Relation to Repairs and Maintenance

All reports into the reform of residential tenancies law have recommended that there should be a statutory obligation imposed on the landlord (notwithstanding any contrary provision in the lease), to provide premises fit for human habitation at the commencement of the tenancy and to maintain them in a state of good and tenantable repair throughout the tenancy.

In brief, suggested reforms have included the following:

(i) Permitting the tenant to quit the lease.

This option would result from a logical extension of the *Smith v Marrable* Principle and would effectively allow the tenant notice of termination in situations where the

premises are unfit for human habitation or become so during the tenancy (irrespective of whether the premises are furnished or not). Although the remedy is of itself not adequate, it is possible that it could be offered as one of a number of alternative remedies available to the tenant.

(ii) Permit the tenant to make a proportional reduction according to the extent of disrepair

This was the option canvassed by the Law Reform Commission (Tas.). This option would enable a tenant who is obliged to live in premises requiring repair to withhold a certain percentage of the rent, until the repairs are done. Rent abatement guidelines could be available which itemise defects and set a percentage decrease in rental value per day. Rather than allowing the remedy to operate as a self help measure, it would be preferable if a procedure was introduced whereby a tenant may apply to the tribunal for an order for partial rent abatement.

(iii) Permit the tenant to withhold all rent

This remedy would permit the tenant to pay each rental payment to the tribunal where the landlord had failed to comply with the repair covenant. The remedy has been used widely in the United States jurisdictions, and examples of legislation permitting this remedy are contained in the Bradbrook Report.[23]

(iv) Allow the tenant to do repairs and deduct the cost from the rent

The advantage of this remedy is that needed repairs can be undertaken with speed, so as to minimise inconvenience to the tenant. Legislation covering the operation of the remedy needs to specify:

(1) The time period for compliance in respect of urgent and non-urgent repair requests.

(2) A maximum monetary limit on the "repair and deduct" system.

(v) Requirement of registration in accordance with a rental housing code

One of the reforms recommendations, advanced by the Community Committee on Tenancy Law Reform in Victoria is the proposal to establish a Rental Housing Code, which details acceptable standards for conditions and facilities in rental housing.[24] The model proposes registration of premises subject to compliance with the Code. The Victorian Community Committee model proposes that inspections should be carried out be local government officers, who would keep detailed records of properties in each respective municipality. A registration fee could be calculated to cover the cost of initial inspections. Given the extensive initial investigation workload, such a scheme would need to be phased in over a period of several years, following which it should be unlawful to let unlicenced premises.

In assessing these proposed reforms, it is important to reduce the availability of "self-help" measures to either party, because of the potential for such measures to be misused. It appears the most appropriate reforms would allow the tenant to attend to "urgent repairs" where the landlord is not available, and to deduct the cost of repairs from the rent. For non-urgent repairs, the tenant should have the right to apply to the tribunal for a repair order in situations where the landlord has not complied with the request within a reasonable period of time. It is further submitted that the landlord should be entitled to seek immediate compensation and possession order, where there is evidence of malicious or substantial damage to the premises by the tenant.

A more detailed analysis of reforms in other Australian jurisdictions is contained in Chapter 6.

3.7 Discrimination

3.7.1 State Legislation

There is no state anti-discrimination legislation in Tasmania. An anti-discrimination Bill was introduced into Parliament in 1979, which would have made it unlawful to discriminate in relation to the provision of required services such as the provision of accommodation (including the granting of the lease).[1] The specific grounds of discrimination in the 1979 Bill were: sex, marital status, particular ethnic characteristics and personal handicap.[2] The Bill was referred to as Select Committee of the Legislative Council in November 1979, who came to this surprising conclusion in their summing up:

> "Not only is there no need for legislation, but it is not in the interests of the community for it to be introduced."[3]

3.7.2 Commonwealth Legislation

The relevant Commonwealth Acts applicable in Tasmania are the *Racial Discrimination Act, 1975* (Cth) and the *Sex Discrimination Act, 1984* (Cth). The *Racial Discrimination (1975)* makes it unlawful to discriminate on the grounds of race, colour, descent or ethnic origin. The Act prohibits discrimination in the provision of good and services including accommodation. Section 12 also makes it unlawful to restrict the licencees or invitees of the occupier of the land by reference to race, colour, and national or ethnic origin. Certain ancillary acts are prohibited under the legislation, including display or discriminating advertisements (S.16), or the victimisation of a person who proposes or makes a complaint (Section 27(2)(d)).

A tenant denied accommodation, or offered accommodation on less favourable terms or evicted from accommodation, may lodge a complaint with the Human Rights

Commission (H.R.C.). Under the Act, if the Commission is unable to solve a complaint by conciliation or through a compulsory conference, a certificate to this effect is issued, enabling the complainant to institute proceedings in a Civil Court.

Assessment

Under the *Racial Discrimination Act*, the Plaintiff must prove that the act was performed by reason of the race of the person, and, if there were other reasons, then the discrimination on the grounds of race must be the dominant one. The definition of discrimination in the Act is essentially narrow and intention based. A broader view would encompass indirect and perhaps unintentional acts of discrimination, such as applying a condition to which specific classes of persons of different racial groups would have different access. An example might be the requirement that all tenants have an income exceeding $25,000.00 per annum.

Currently under its legislative review functions, the Commission is considering amending the *Racial Discrimination Act.*[4] It is recognised that two of the major weaknesses of the Act are:

(1) The lack of an express provision against indirect discrimination and

(2) The requirement that discrimination must be the dominant purpose of the act or practice, in respect of which there is a complaint.[5]

There are several additional problems which should receive consideration in any legislative review which is undertaken:

(i) The Commission does not have the power to compulsorily acquire evidence.

(ii) The penalty for failure to attend a compulsory conference is only $500.00 (S.24(4)).

(iii) Any settlement reached currently is not enforceable.

(iv) The Commission has no power to initiate or conduct Court action on behalf of the victim.

(v) One of the difficulties in dealing with discrimination cases involving rented accommodation, is the problem that by the time the complaint is actually heard in Court, it is likely the accommodation will have been relet. Bradbrook suggests that one option in legislation would be to grant the Commissioner power to grant interim injunctions.[6]

(vi) Discrimination is difficulty to prove, and it is often the case that the perpetrator will seek to explain his/her behaviour on a number of plausible pretexts. Issues over the onus of proof will be crucial in mounting a successful action. Under the *Racial Discrimination Act* the complainant must prove discrimination has occurred on the balance of probabilities. It is suggested that the onus of proof might be changed so that in any situation in which the aggrieved person alleges discrimination, the onus of proof is on the discriminator to prove that the refusal was not for a racially discriminatory reason.[7]

Sex Discrimination Act 1984 (Cth)

The *Sex Discrimination Act* takes a wider view of discrimination including indirect discrimination. This occurs if the discriminator requires the aggrieved person to comply with a requirement or condition, with which a substantially higher proportion of persons of that class are not able to comply. The grounds of discrimination are specified as sex, marital status or pregnancy.[8] Such a definition is clearly preferable to that contained in the *Racial Discrimination Act.* Where an act is done for two or more reasons, the *Sex Discrimination Act* does not require the discriminatory reason to be the dominant or substantial one, but simply that it was included amongst the reasons.

In general terms, the existing Commonwealth legislation would appear to provide a somewhat piecemeal and fragmented approach to the problem of dealing with discrimination in rental accommodation:

(i) A number of forms of discrimination are not covered by the Commonwealth legislation including discrimination in respect of children, physical and mental handicap, age, religious or political conviction, homosexuality, unemployment or receipt of a pension.

(ii) It would appear that despite the existence of the complaint provisions, there have been no claims of discrimination with respect to accommodation lodged with the Commission in Tasmania in the last 2 years.[9] In the financial year ending 30th of June, 1988 23 complaints were lodged under the *Sex Discrimination Act*, 17 of which related to the area of employment.[10] Seven complaints were lodged under the *Racial Discrimination Act*, but none of the cases related to discrimination in the area of accommodation.[11] Overall in Australia only .5% of cases lodged with the Commission in 1988 involved discrimination in the area of accommodation. It is suggested that the lack of complaints is not indicative of the absence of discrimination problems, but rather is illustrative of the general lack of knowledge in the community about the availability of legal forms of redress. It is significant to note that in over 25% of complaints lodged under the *Sex Discrimination Act*, the respondent was in fact the Commonwealth Government itself.[12] This may suggest a high level of awareness of the Commonwealth Acts by Commonwealth public servants who comprise the complainants.

(iii) Mention is made in the 1988 Annual Report of the Commission,[13] of the increasing role of lawyers appearing for respondents. This has created a number of problems resulting in:

(a) Increased costs.

(b) Emergence of a traditional adversarial confrontationalist approach which frustrates the objectives of conciliation. Instances cited by the Commission have included lawyers advising clients not to participate in interviews or conferences and not to provide documents.

(c) An inconsequence of (b) considerable delays in resolution.

(d) Also noted has been the lack of awareness of most lawyers about the legislation and its intent.

(iv) It has been recognised by the Commission that its jurisdiction to remedy discrimination and breaches of human rights, arising from Commonwealth legislation, is limited because of the provisions of the Act it administers. Currently the Commission is reviewing the *Racial Discrimination Act* legislation.

(v) The major issue which arises in consequence of these problems is whether the issue of discrimination in accommodation should be left to be dealt with as a matter of broad government policy, or whether specific discrimination provisions should be contained in any new proposed legislation. It is submitted that in terms of the educational objective of any new residential tenancies legislation, that all rights and obligations in relation to tenancy agreements should be contained in the legislation. It is further recommended that the appropriate forum for the resolution of discrimination disputes should be the Residential Tenancies Tribunal, because:

(1) It will often be necessary to determine additional ancillary tenancy matters.

(2) Proposed powers of the Tribunal will enable it to grant quick and

appropriate remedies. (Including an order that parties enter into a contract, and interim injunction powers).

Recommendations for discrimination provisions for new legislation, are set out in Chapter 7.

3.8 Commonwealth Privacy Legislation

In 1988 the *Privacy Act* was passed by the Commonwealth Government, following a period of intense community debate on the Australia card proposal, and the introduction of an upgraded tax file number system. The *Privacy Act* establishes a Privacy Commissioner[1] and sets out a number of privacy principles (referred to as I.P.P.S.). These principles govern collection, retention, access to, correction, use and disclosure of personal information about individuals.[2]

Originally when introduced, the Act applied only to Commonwealth departments, but in June 1989 an amending Bill was introduced,[3] to extend the *Privacy Act*, so as to regulate the consumer credit reporting industry. The Bill was prompted by government concerns over an industry proposal to introduce a private central database which would comprise, in part, all outstanding consumer credit contracts on a monthly basis. The 1989 Privacy Amendment Bill defines:

(i) The kind of information which can be held by a central credit reporting agency.

(ii) Who can have access to that information.

(iii) For what purposes the information can be used.[4]

In essence, both the substantive Act and the 1989 Amendment Bill aim to balance the competing considerations of an individual's right to privacy against government and

the credit industries legitimate right to limit fraud and default. Because of the difficulty in enforcing misuse provisions, the issue of access is crucial to the success of the legislation. Rules governing access are also crucial, given that the credit reporting industry utilises on line data bases, with over 23,000 terminal points.[5]

Where the Privacy (Amendment) Bill 1989 is relevant to the area of residential tenancies, real estate institutes and agents have been lobbying the government[6] to be included in the class of consumer credit providers who have access to database information. Under the bill, real estate agents will lose the right to conduct credit reference checks on prospective tenants.

It is submitted that real estate agents have no real substantial claim to consumer credit information since they are not credit providers. The nature of a tenancy contract differs considerably from that of a contract of credit. Obtaining credit usually involves the provision of a service in advance of payment, and the payment of interest for the convenience of paying later. In respect of tenancy agreements, the landlord generally receives a bond and rent in advance. Unlike contracts for credit, the subject matter of a tenancy contract is property that is real, immovable and fixed.

The arguments, in support of access, advanced by the Real Estate Institute of Australia are, in summary, these:

(i) That consumer credit records indicated "credit worthiness".

(ii) That access to the database would allow them to check a prospective tenant's credit worthiness and that denial of access diminishes the real estate agents ability to select trustworthy tenants.

(iii) That failure to obtain access will result in the landlords automatically rejecting low-income earners as tenants, leading to discrimination against particular categories of tenants.

(iv) And, in consequence, the legislation will inevitably lead to an increase in the incidence of default in rental payments and to higher costs, causing a decline in available rental properties.

Firstly, in response to these arguments, the link between consumer credit records and "credit worthiness" is spurious. 90% of files held by the Credit Reporting Agency of Australia (C.R.A.A.) contain "inquiry only" information and only 18% of information relates to defaults or bankruptcy.[7] It is unlikely that such information would be useful to landlords, and in fact only about 600 of the 9,000 real estate agents operating in Australia use C.R.A.A. services.

Secondly, there are dangers in relying on credit information for the assessment of suitable tenants. A tenant who defaults or delays payment of bills, does not, ipso facto become a tenant who is likely to default in rent payments. Generally, in poor families, it is rent and electricity payments which receive priority. Therefore, access to the database would permit discrimination in the supply of housing on spurious grounds, and allow (or possibly ensure) discrimination against people on the basis of tardiness in payment of some bills, or even in relation to the frequency or nature of their credit inquiries.

Thirdly, errors can and do occur in the maintaining of computerised databases. There are instances on record of people being denied housing on the basis of credit files which are inaccurate, dated or in dispute.[8] It may take months to correct such an erroneous record, whereas a decision to lease a property can be made within a few days or hours. During this time a tenant may be denied housing until the record is deleted or amended.

Fourthly, the C.R.A.A. hold files for around 5 years, and, in consequence, individuals who have previously had financial difficulties will be penalised for a lengthy period in their access to housing.

Fifthly, if real estate agents were to be granted access to the database and individual landlords excluded, this would create an indefensible anomaly in the access provisions. If access were to be extended to individual landlords, it becomes apparent that the basis of privacy protection embodied in the legislation would be destroyed. In consequence, the framework for the system of protections would become unsustainable.

Sixthly, since comparatively few agents at present use C.R.A.A. records, it seems reasonable to suggest that existing avenues for acquiring information about prospective tenants are already adequate. A landlord may ask relevant questions and request supply of references and other supporting material from tenants. It is not necessary, nor is it desirable, that landlords (whether agents or not) should have access to an individual's personal credit history.

Seventhly, the current law in relation to residential tenancies already provides ample redress for a landlord, in situations in which a tenant may default in the payment of rent. Clauses in most current tenancy contracts allow re-entry and possession, for breach of the payment for rent and other covenants. Landlords at present have a common law right to deduct unpaid rent from bond money. Proceedings may also be instituted in the Small Claims Division (Court of Requests) in relation to monetary disputes not exceeding $1,500.00.

Finally, a consumer who gives information to a credit provider does not reasonably expect that information to be passed on to a real estate agent. This is an important consideration, for it relates directly to the objective behind privacy legislation, and the expectation of consumers that when they provide information to a credit provider, it will only be used for the purposes for which it was provided. Allowing real estate agents access to credit information would appear prima facie to violate principles nine and ten of the substantive act.

At the time of writing this report, the 1989 Privacy Amendment Bill is still being considered by Federal Parliament, and the outcome in relation to real estate agents access has not yet been determined.

3.9 Conclusion

In analysing the application of common law principles to residential tenancies, two doctrines emerge as crucial in providing some account of the development and current state of the law. The first is the notion of "freedom of contract", namely that the parties to a contract are free in law to negotiate the terms of their own lease. The second is the doctrine of "property rights", namely that the law attaches considerable importance to the rights of owners to deal with it in a private and unfettered manner.

The principle of "freedom of contract" in law, and operation of the principle in practice, are widely divergent notions. Partington gives an account of this distinction in terms of two competing models which purport to represent the landlord/tenant relationship.

"The Consensus Model"

The consensus model is described by Partington in these terms:

> "If asked to characterise the essential nature of the landlord tenant relationship, most lawyers would state that it is an example of the principle, that private owners should have the right to *dispose of interests in their land if they wish* - in this case for limited periods of time. During the period of the lease, the tenant acquires a legally recognised, but necessarily restricted, interest in the land, and the term on which his use and enjoyment of that land are based, are contained in collateral contractual agreements *(covenants) which have been negotiated and agreed between the parties.*"[1]

The characterisation of the landlord tenant relationship in such terms gives the impression of a relationship founded on consensus and agreement.

"The Conflict Model"

Conflict theorists would argue that it is important to look behind the discrete surface appearance of a tenancy contract, to the underlying reality of the social relationships which exist between the parties.

The conflict model rejects the "consensus" and "agreement" account of the relationship between the parties, and calls into question the subjective expression of legal rules and documents.

The model provides a framework for analysing social relations in terms of "clashing interests", rather than "shared agreements". The nature or essence of the real relationship is one founded on the power of property on the one hand, against the powerlessness of those who do not possess property. As Partington points out:

> "The notion of property rights has a necessary corollary, that for the non-propertied there may be no rights."[2]

One of the major proponents of this view is Karl Renner, who described the relationship between an owner and his property as bringing into being a social function which was not in accord with conventional legal analysis. In the hands of its owner, property becomes "in turn, a title to power, to profit, to interest, to profit of enterprise and to rent". Renner's analysis is concerned with the unjust social and economic relationships which arise from the ownership of certain types of property. The conflict model calls into question the assumptions about "shared values" and "consensus" which underlie the doctrine of freedom of contract. It suggests that the

consensus view of the relationship between individuals and the state is materially defective.[3]

"Conflict" or "Consensus"?

In analysing the common law principles and the substance of tenancy contracts, it is difficult to avoid the conclusion that there is in practice, no real freedom of contract.

In respect of most residential tenancy agreements, the documents do not represent a "free negotiation", but rather a forced acquiescence in terms set by the dominant party. Most legal commentators have also pointed to the inequalities between the parties in terms of economic strength, information and business and legal "know how". An examination of the current substantive law points to substantial defects, which are the product of "the sanctity of freedom to contract" and "the long established principle of the right to enjoy private property". In brief, the current law:

- Exempts the landlord from an obligation to ensure the dwelling is fit for human habitation.
- Sanctions one sided or unconscionable lease agreements in situations of manifestly unequal bargaining.
- Permits arbitrary eviction on short term notice regardless of the tenants length of tenure.
- Condones practices which restrict housing access or positively discriminate against poorer people (such as the bond system and prohibitions against children).
- Fails to guarantee the privacy and security of the tenant in his/her own home.

The importance of these contrasting models, to law reform considerations, is to make more explicit and systematic the usually implicit, and often unrecognised, valued

assumptions which underlie the construction of legal principles. Conflict theorists would argue that it is this appeal to abstract theory which has maintained the inequalities in the relationship between the parties, by obscuring the real relationship of power that generally exists between landlord and tenant. Paul Rock has called this process "reification of the law".[4] Essentially, this means that the law (and legal principles) becomes seen as a phenomenon which is discrete and detached from any social process. The legal principle then develops a life of its own, enabling it to develop and present a false conceptionalisation of the social relations which underpin it. One could probably give some account of the failure of the common law to redress inequalities which exist in reality by its failure to distinguish between the "the verbal symbol" and the "social fact".

It is likely in any reform process that those opposed to reforms will appeal to the general legal maxims to be preserved. This defence of the doctrine of freedom of contract can be seen, for example, by examining the Victorian Law Institutes response to the pressure for reform of Victoria's antiquated tenancy laws in 1979. Commenting on what was essentially a modest realistic and "fairly balanced" bill they said:

> "The bill does violence to the freedom to contract and enforce freely negotiated contracts ...
>
> It is an affront to the long established community principles such as the right to enjoy private property. The bill constitutes a undesirable interference with the normal market forces in a free enterprise economy..."[5]

In view of predictable appeals for the principles to be retained, the writer has felt it important to briefly analysise operation of the doctrines in theory and practice. For it appears that the landlord tenant transaction cannot be left to be governed by an appeal to the doctrines such as "freedom of contract", without substantial injustice.

FOOTNOTES - CHAPTER 3

3.1

1 See *Errington v Errington & Woods* [1952] 1 K.B. 290, *Crane v Morris* [1965] 3 All E.R. 77.

2 The exclusive possession test had been favoured by earlier English and Australian Courts, see for example *Landale v Menzies* (1909) 9.C.L.R 89; *King v David Allen & Sons, Bill Posting Ltd* [1916] 2 A.C. 54.

3 [1952] 1 K.B. 200 at p. 296.

4 Other indicia may include whether there is mention in the document of a business or personal relationship between the parties, whether the clauses in the document are more consistent with the existence of a tenancy, and the nature of the monetary payments received.

5 [1960] 1 W.L.R. 239.

6 Ibid, at p. 245.

7 [1978] 1 W.L.R. 1014. In this case the clause permitting a third party to share, was never intended by the parties to be operative.

8 See, for example *Crane v Morris* [1965] 3 All E.R. 77, per Lord Denning, at p. 78.

9 Bradbrook, A. Residential Tenancy Law & Practice, op cit at p. 78.

10 (1959) 101 C.L.R. 209.

11 Ibid, see Taylor, J. at p. 217, McTiernan, J., at p. 2141 and Windeyer, J. at p.221.

12 [1965] 3 All E.R. 77.

13 (1959) 101 C.L.R at p. 220.

14 Ibid at p. 217.

15 Ibid at p. 221.

16 (1969) 43. A.L.J.R. 69.

17 Ibid at p. 71, per Kitto, J. The majority found that portions of a wall could form the basis for a lease (Kitto & Windeyer J.J. dissenting).

18 [1985] 1 N.S.W.L.R. 731.

19 (1973) 128 C.L.R. 199.

20 [1985] 1 N.S.W.L.R. at p. 735.

21 Ibid at p. 736.

22 Ibid at p. 737.

23 [1985] 2 All E.R. 289.

24 Ibid, per Lord Templeton at p. 885 - 6.

25 Osborne. A Concise Law Dictionary, Sweet & Maxwell, 1964.

26 *Land Titles Act* Section 64(1) and (2).

27 *Land Titles Act*, 1980, Section 66(a) and (b).

28 Ibid, Sections 67(a) and (b).

29 See item 16, 2nd Schedule, *Stamp Duties Act*, 1931.

30 Honourable Mr Justice King in his forward to Bradbrook, A. et al Residential Tenancy Law and Practice, (Victoria and South Australia) op cit (vii).

31 The Tenancy Advice Service is run by the Tenants Union of Tasmania. It operates as a part time advice and negotiation service for tenants in the private rental sector. The service is funded by the Federal Attorney General and operates on a budget of $16,000.00 per annum.

32 See Annual General Report Tenants Union of Tasmania (1988).

33 See Appendix 3.1.

34 Northside Real Estate Lease, clause 3; Launceston Nationwide Realty Agreement, clause 3(b); Moanes Real Estate Lease, clauses 2 & 3. All leases referred to are contained in Appendix 3.

35 See lease contained in Appendix 2.3, clause 10; Appendix 2.2, clause 9; Appendix 2.3, clause 9.

36 See Appendix 2.9 and 2.4.

37 See Appendix 2.3.

38 See Appendix 2.1, clause 5.

39 Both the South Australian legislation (Section 92 subsection 1) and the Victorian legislation (Section 7 subsection 3) expressly introduce the doctrine of unconscionability in granting the respective tribunals power to vary a term, or declare it void.

40 See Bradbrook, A. op cit at p. 66; Sackville, R. op cit at p. 89; Law Reform Commission Tasmania Report number 19, op cit at p. 24; Report of the Community Committee Victoria 1978, op cit at p.56; Cabramatta Tenancy Working Party, op cit at p. 49.

41 See Bradbrook, A. op cit at pp. 66 and 67; Sackville, R. op cit at p. 90; Law Reform Commission of Tasmania, Report No. 19 at p. 24.

3.2

1 A licencee is defined under the Act as a person holding an auctioneer licence, an estate agents licence, a manager's licence, a probationary auctioneer's licence, or a real estate salesman's licence in force under the Act.

2 Sackville, R. Law and Poverty in Australia: Poverty and the Landlord/Tenant Relationship, Commission of inquiry into poverty. A.G.P.S., 1975. *N.L.S v Hughes* (1969) 20 C.L.R. 583 raises an additional question, namely whether the extend of bond money limited the lessee's liability on repudiation of the lease. In this case a bond of £300 was given as assurance of the observance of covenants and payment of rent. The majority held that the sum agreed upon was not a pre-estimate of damage which would preclude the recovery of more than that sum as damages for any breach of the lease.

3 Ibid, p. 71.

4 In one case currently being handled by the Tenancy Advice Service (Tenants Union of Tasmania), the amount of security deposit requested and paid for by the tenant (a sole parent with three children) for a rural house in the Glen Huon area was $1,000.

5 Sackville points out that even if the machinery for resolving landlord/tenant disputes to reduce cost and delays, tenants will still be reluctant to take action to dispute the landlord's withholding of the bond money and that consequently steps should be taken to reverse the onus of taking action in bond cases.

6 Reforming Victoria's Tenancy Laws. Report of the Community Committee on Tenancy. V.C.O.S.S., 1978, p. 46.

7 Bradbrook, A. Poverty and the Residential Landlord - Tenant Relationship; Australian Government Commission of Inquiry into Poverty. A.G.P.S., 1975.

8 Tenants' Union of Tasmania. Submission for Funding of the Advisory Service 1989.

9 This observation is supported also in the A.C.O.S.S. Submission to the Commonwealth Commission of Enquiry into Poverty where the authors note: "Intended as a safeguard to the landlord against undue damage over and above 'wear and tear', it is seen by many landlords and their agents simply as extra money in pocket at the commencement of each tenancy.

10 Tenants' Union of Tasmania. Landlord Tenant Law Reform. Submission to the Law Reform Commission. March 1977.

11 In *Walker v Schroeder* Court of Requests, Hobart 1977 the Magistrate held that "where any rented premises are vacated there is always some cleaning which the landlord would expect to do before he is able to let the premises to a new tenant."

12 "In the absence of a well documented inventory or the refusal by a landlord or his agent to inspect premises prior to a tenant taking up residence, the tenant cannot prove that for example, stains on the carpet, marks on the wall or cracked window panes were there before he moved in. Neither it is apparent if the landlord is prepared to accept 'fair wear and tear' as part of his overheads." A.C.O.S.S. Study on Landlord/Tenant Relations, 1974, p. 24.

13 Report of the Community Committee on Tenancy Law Reform, op cit, p. 40.

14 Ibid, p. 40, Lyle Evans, Secretary of R.E.S.I. (1975) however said: "Complaints made in regard to non-return of bond money directed to this institute are unusual ... Only the unresponsible tenant need fear that his bond money will not be returned. We believe that the general public have the right to expect the very highest standards of professional and ethical conduct form our members. The minute number of complaints received from tenants encourages us to think this is in fact what occurs."

15 In contrast to the above view, a senior official from the Small Claims Tribunal (Victoria) 1974 said: "We have had hundreds of inquiries from tenants with bond problems. From these, it would seem to be common practice at present

for landlords to keep bond money without justifiable ground." Reported in Salvaris, M. and Faulkner, A., ibid, p. 17.

16 Western Australian Council of Social Service - 'Poverty - the A.C.O.S.S. Evidence, (1973), p. 260.

17 Bradbrook: op cit, p. 43.

18 Ibid, p. 42. Questions on whether the tenant thought the deduction was fair was incorporated into the questionnaire in order to indicate potential areas of abuse.

19 Ibid., p. 42.

20 Centre for Urban Research and Action. Western Regions Tenancy Survey (Fitzroy, 1977), reported of the Community Committee on Tenancy Law Reform 1978, op cit, p. 38.

21 If many of these groups cannot afford the establishment costs including high bonds, they are forced into paying exorbitant rents/no bond accommodation by unscrupulous landlords who exploit this situation.

22 This is one of the arguments advanced by the Community Committee, against even a modified bond security system. In examining the New South Wales Act and administration the Committee agreed that the costs of the scheme would be high and that it was likely to lead to considerable delays in the refunding of money.

23 In addition, the Committee pointed out that the Act may lead agents to do away with bonds and to concentrate instead on much more stringent selection procedures.

24 A study by the Ontario Law Reform Commission on 118 landlords, found that there was no significant difference in the extent of damage to property before and after the security deposit system had become established, and therefore their value as a deterrent had not been established. British Columbia, Law Reform Commission: Report on Landlord and Tenant Relationship, 1973. p. 209, reported in the Victorian Community Report, op cit, p. 42.

25 Sackville, op cit, p. 70.

3.3

1 In the 1987/88 financial year the Advice Service handled 105 complaints concerning evictions (9.5% of the workload).

2 See appended leases contained in Appendix 2. Specifically 2.3 (clause 10) , 2.4 (clause 10), 2.6 (clause 3), 2.7 (clause 4), 2.8 (clause 4).

3 See *Residential Tenancies Act 1980 (Vic)*; Sections 109 - 137; *Residential Tenancies Act 1978-81 (S.A.)* Sections 61 - 83; *Residential Tenancies Act 1987 (N.S.W.)* Sections 53 - 78; *Residential Tenancies Act 1987 (W.A.)* Sections 59 - 81.

1 *Jones v Lavington* (1903) I K.B. 253. Reaffirmed in a number of successive cases including *Kenny v Preen* (1963) 1 Q.B. 499.

2 *Kenny v Preen* (1963) 1 Q.B. 499 at p. 511 per Pearson. L.J.

3 "... and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any person or persons lawfully claiming by, from or under him, them or any of them." Second Schedule, Part II, *Landlord and Tenant Act (Tas) 1935,* 26 GEO.V. No. 42.

4 (1842) 3 Q.B.105.

5 (1911) 1 Ch. 219.

6 (1956) 2 Q.B. 99.

7 (1963) 1 Q.B. 499.

8 See also *Gordon v Lidscombe Developments Co Ltd* [1966] N.S.W.R. 9.

9 [1969] S.A.S.R. 34.

10 (1884) 13 Q.B.D. 547.

11 See also *Haig v Chesney* (1925) S.A.S.R. 82., where a defective steam cooker installed by the landlord in adjacent tenants premises caused damage to the tenant's skylight.

12 See *Malzy v Eicholz* (1916) 2 K.B. 308 (CA) and *Jaeger v Mansions Consolidated Company Ltd* (1903) 87 L.T. 690 (CA).

13 *Hills v Harris* (1965) 2 Q.B. 601.

14 As in the case of *Jenkins v Jackson* (1888) 40 Ch. 71 where the defendant landlord let business premises to the tenant and subsequently let the floor above for entertainment. The tenants action in nuisance was successful, but the tenants action in respect of breach of the covenant for quiet enjoyment failed to succeed.

15 See *Lavender v Betts* (1942) 2 All E.R. 72, where the landlord was found liable in trespass and for breach of the covenant for quiet enjoyment, when he decided to drive his tenants out by removing the doors and windows from the premises. The tenants succeeded in obtaining aggravated damages.

16 In *Perera v Vandiyar* [1953] I W.L.R. 672, where the tenant failed to succeed in a trespass action. In this case the landlord turned off the gas and electricity to the tenanted premises, forcing the tenant, wife and baby out of the premises. The Court found that although the irritation tactics were deliberate and malicious, this did not constitute an interference with any part of the premises and could not therefore be regarded as trespass. See Street, "Tactical Irritation of Tenant" (1953) 16 Modern Law Review, 522.

17 *Drane v Evangelou* [1978] 1 W.L.R. 455. *McCall Abelesz* [1976] Q.B. 585.

18 *Mint v Good* [1951] 1 K.B. 517.

19 See *Land Titles Act* Section 64(2).

20 White's Real Estate, Lease Agreement (1989) Section 2(f).

21 See Bradbrook, A. op cit, Chapter 15.

3.5

1 For a review of the overseas experience in 3 jurisdictions (Britain, Canada and United States) see Bradbrook, A., Poverty and the Residential Landlord Tenant Relationship, op cit at pp. 86 - 91.

2 At the outbreak of World War II both the Commonwealth and States were concerned that because of the housing shortage (created by the channelling of building materials and labour into the war effort), that in the absence of legislative intervention, landlords could exploit the shortage by rapidly increasing rent. This lead to the enactment of the National Security (Fair Rent) Regulations of 1939.

3 See Section, 8B *Substandard Housing Control Act, 1973-5 (Tas.).*

4 General systems of rent control, fix or determine rent throughout the private rental sector. Examples of general rent control measures would include (i) rent freezes (such as the war time legislation in Tasmania), (ii) "rate of return" rent control (such as the New York system), (iii) "comparative" rent control (such as the scheme in Britain). Selective systems of rent control, are milder in form and are based on the recognition that landlords need to make some satisfactory profit to preserve the private rental market.

5 Rent regulation is traditionally a contentious area of tenancy law. Writers such as F.A. Hayek and Milton Friedman have strongly criticised rent control legislation. One example of an emotive and extreme publication on this issue is Verdict on Rent Control: Essays on the Economic Consequences of Political Action to Restrain Rents in 5 Countries, Institute of Economic Affairs, 1975.

6 Law Reform Commission of Tasmania Report No. 19 at pp. 10 - 11. Similar recommendations in respect of substandard accommodation are contained in the Report of the Community Committee on Law Reform (Vic.), Reforming Victoria's Tenancy Laws, at p. 28. The Victorian report however prescribes a much more active role for intervention in respect of above substandard accommodation.

7 Sackville, R., op cit at p. 87, Bradbrook, A.J., Poverty and the Residential Landlord Tenant Relationship, p. 80, Report of the Community Committee on Tenancy Law Reform (Vic.) 1976, Reforming Victoria's Tenancy Laws, at pp. 26 - 29. The Cabramatta Tenancy Working Party Report was critical of "excessive rent" appeals system, as superficial, and recommended that the N.S.W. government should undertake an inquiry into establishment of a comprehensive system of rent control to deal with the inflationary spiralling rents in N.S.W.

8 Bradbrook, A., Poverty and the Residential Landlord Tenant Relationship, op cit, at p. 47.

1 *Smith v Marrable* (1843) 152 E.R. 693. In this case the Court of Exchequer held that because a house was infested with bugs, the tenant was fully justified in abandoning the premises. The Court of Appeal, however, declined to extend the rule, so as to extract from the landlord an implied warranty that the premises should continue to be fit for occupation during the tenancy. So if a defect occurs during tenancy the tenant has no remedy. See also *Pampris v Thanus* (1968) N.S.W.L.R. 56.

2 *Cruse v Mount* [1933] Ch. 278.

3 Bradbrook, A. Poverty and the Residential Landlord-Tenant-Relationship op cit at p. 20.

4 The only exception may be for fraudulent misrepresentation as to the state of the dwelling at the commencement of the tenancy.

5 The legal definition of "waste" is "whatever does damage to the freehold or inheritance of the land, or anything which alters the nature of the property". Voluntary waste is an offence of commission, such as pulling down a house. Permissive waste is an offence of omission, such as allowing the house to fall down because of a failure to attend to repairs.

6 *Regis Property Company Limited v Dudley* (1959) A.C. 370; *Warren v Keen* (1954) 1 Q.B. 15, 3 All E.R. 521.

7 Chernov, A., op cit, p. 110.

8 Ibid, p. 110. See also *Torriano v Young* (1833) 6C and P8; *Warren v Keen* (1953) 3 All E.R. 521, (1954) 1 Q.B. 15.

9 Number 99 of 1973. The Act was introduced by the Minister for Housing, Mr Doug Lowe.

10 Preamble. *Substandard Housing Control Act (Tas.) 1973.*

11 See "The Mercury", Thursday, November 1, 1973.

12 Substandard Housing (Standards of Habitation) regulations 1974. Statutory Rules 1974, No. 119.

13 See Section 14(1) and (2). *Substandard Housing Control Act 1973.*

14 See Section 5. *Substandard Housing Control Act 1973.*

15 Personal communication. Waverley Griggs. Substandard Housing Control Section. Housing Tasmania. The reason for design of the form was that there was departmental concern that a number of public housing applicants were attempting to gain priority consideration, by claiming their premises were substandard. Prior to the new system, it had been departmental policy to inspect all premises in respect of which there was a complaint, but many reports were found following investigation to be unsubstantiated.

16 Bradbrook, A. "Methods of Improving the Effectiveness of Substandard Housing Control Legislation in Australia". University of Tasmania Law Review, 166.

17 See "The Mercury" Thursday, November 20, 1975 and the Preamble *Substandard Housing Control Act 1973.*

18 In the 1971-72 financial year 240 houses were removed from the rental marked, compared with 301 upgraded.

19 Bradbrook, A. "Methods of Improving the Effectiveness of Substandard Housing Control Legislation in Australia" op cit at p. 172.

20 It may be that improvements have been undertaken on a number of dwellings, but that the owner has not made application for the order to be removed. On the odd occasion the matter is raised, when the department is contacted by the solicitor of a potential purchaser, who wishes to have the notice removed from the title, prior to purchase. What is apparent however is that the Housing Department is unable to give any account of the state of repair of dwellings under its control.

21 Bradbrook, A., op cit at p. 167.

22 Ibid at p. 170.

23 Bradbrook, A., Poverty and the Residential Landlord - Tenant Relationship, p. 25.

24 See Report of the Community Committee on Tenancy Law Reform, Victoria, 1978 at p. 32.

3.7

1 See Section 5 subsection 1; Section 4(c). Section 5(6) further defines "accommodation" as the living accommodation required for a person or his family, or accommodation required by a person for the purposes of any employment in which he is engaged.

2 See Section 7 Anti-discrimination Bill, 1979.

3 Legislative Council Select Committee into anti-discrimination legislation, 1980 at p. 18 (S.36).

4 Since its introduction in 1975, only one minor amendment has been made to the *Racial Discrimination Act.* See *Statute Law (Miscellaneous Provisions) Act Number 38, 1988*, amending Section 3(1), Section 24(3) and Section 25(2). The amendment inserts a new Section 45 which protects commission members against civil action proceedings.

5 Human Rights Australia, Annual Report 1987-88 at p. 8.

6 Bradbrook, A. op cit, at p. 229.

7 Evans, "New Directions in Australian Race Relations Law" (1974) 48 A.L.J. 479 at p. 488.

8 *Sex Discrimination Act*, No. 4, 1988, see Section 5 (sex discrimination), Section 6 (discrimination on the grounds of marital status) and Section 7 (discrimination on the grounds of pregnancy). Although the definition of marital status is wide, it should be noted that it does not include homosexual couples (see, definition S.4 (1)).

9 Annual General Report. Equal Opportunity and Human Rights Commission for the period 1st of January, 1988 to 30th of June, 1989.

10 Annual General Report of the Human Rights and Equal Employment Opportunity Commission 1987-8 at p. 26.

11 Ibid, p. 28.

12 Ibid, p. 26.

13 Ibid, p. 15.

14 See the views of the Tasmanian Law Reform Commission, Report Number 19, dealing with the common law and statute law in Tasmania relating to residential tenancies (at p. 15).

3.8

1 Part IV Division 1 of the *Privacy Act (Cth.) 1988* sets out the terms of appointment of the Privacy Commissioner. Division II deals with the function of the Commissioner in relation to interference with privacy, and Division III details reports which may be made by the Commissioner.

2 There are eleven such principles set out in the Act, which are based on recommendations of the Australian Law Reform Commission: Report No. 22, "Privacy".

3 Introduced by the Minister for Consumer Affairs and reached the second reading stage on 16 June, 1989.

4 In addition, the Privacy Amendment Bill extends the role of the Privacy Commissioner to cover the consumer credit industry, and grants additional powers to the Commissioner to determine that an individual's privacy has been breached by a credit provider, and to aware damages. The Bill also provides individuals with an enforceable right of access to, and correction of their personal credit records.

5 Memorandum, Ministry for Consumer Affairs, 29 August, 1989.

6 Real estate agents have also placed advertisement in major newspapers arguing in favour of access to the database.

7 Memorandum, Minister for Consumer Affairs 29th August, 1989.

8 The New South Wales Privacy Committee has reported such cases in a recent annual report.

3.9

1 Partington, M., Landlord & Tenant, (2nd Edition) Weidenfeld & Nicholson, London 1980, at p. 2.

2 Ibid, at p. 2.

3 Renner, K., The Institutes of Private Land & Their Social Functions, Routledge & Kegan Paul, New Edition, 1976.

4 Rock, P., "The Sociology of Deviance and the Conceptions of Moral Order", British Journal of Criminology, Vol. 14, pp 139 - 49, 1974.

5 Cited in Teh, G., "Victorian Law Institute Leaps Into the Past" Legal Services Bulletin, Vol. 4, No 6 December 1979.

CHAPTER 4

PRIVATE RENTAL SECTOR: FIELD RESEARCH REPORT

4.0 Introduction

As a part of this review into residential tenancies, it was considered necessary to conduct interviews with a sample of tenants in order to:

(i) Collect data on the major problem areas of the landlord tenant relationship.

(ii) Ascertain tenant views on what changes to the existing law are most needed.

(iii) To identify particular tenant groups who may experience significant problems in the landlord tenant relationship.

In order to provide a basis for analysis, it was decided that the interviews would take the form of a questionnaire. The areas to be explored were chosen on the basis of the findings of the Australian Commissioner of Inquiry into Poverty, on the results other studies, and on statistical records obtained from the Tenancy Advice Service (Tenants Union of Tasmania).

The following areas were identified as being the major problem areas in the private landlord tenant relationship:

1. Security deposits.
2. Letting fees.
3. Tenancy contracts.
4. Rent receipts and increases.
5. Repairs and maintenance.
6. Privacy and quiet enjoyment.

7. Security of tenure.

8. Discrimination.

9. Self help measures ("lockouts" and "distress").

10. Awareness of rights and services.

11. Tenant views on reform of the law.

A copy of the questionnaire is contained at Appendix 1.

4.1 Sampling

It had initially been intended to obtain a random sample of 100 tenanted households and to administer each questionnaire personally. Contact was made with 3 local government municipal officers to obtain a list of dwellings which were likely to be rented. It was hoped to compile a list of rented dwellings on the basis of rate notices, (ie on the assumption that if a rate notice in respect of a dwelling was sent to an alternative address, then the owner did not live at that address, and it was therefore a likely possibility that the dwelling would be tenanted). However it was not possible to extract such information from the database system employed by each of the municipal officers.

A decision was made to:

(i) Administer the survey through organisations who frequently, through the nature of their work, come into contact with tenants.

(ii) Distribute questionnaire's for completion at public places (such as libraries, childcare centres, etc).

A total of 180 forms were distributed and 60 replies were received. A list of participating organisations is contained at Appendix 1.

Definition of Terms

For the purposes of the study, the private rental sector refers to households who are paying rent for the premises in which they live, to either the owner, a real estate agent, or some other agent of the owner (such as a caretaker). Excluded from the sample are:

(i) Households paying rent to the State Housing Authority (Housing Tasmania tenants).

(ii) Households paying rent to their employer, where their accommodation is provided as part of a contract of employment.

(iii) Households paying rent to a family member.

4.2 Findings

Security Deposits

Out of the 60 respondents, 50 (83.3%) paid a security deposit on the dwelling in which they currently live. The amount of money paid as a bond ranged between $150.00 and $1,000.00. The average bond paid for a house ranged between $300.00 and $600.00, and the average bond for a flat ranged between $200.00 to $400.00.

38 (76%) expect a full return of the bond at termination of the tenancy, 8 (16%) expect to have money deducted for a range of reasons (including inside cleaning, repainting, rent owing, damage to property and breach of a fixed term lease). A small percentage (8%) of the respondents thought that it was normal practice to have money deducted.

38 respondents had rented previously in the last 5 years and of these 31 had paid a security deposit. 11 (35.5%) had not received a full refund when the tenancy terminated. Of these 7 (63.9%) had lost all of their bond money and the remaining respondents lost between 5% and 16% of their deposit. More than half the respondents thought that the deduction had been unfair. Only one of the 31 respondents who had paid a security deposit received any interest on the bond.

Letting Fees

In this state, letting fees are payable to real estate agents for costs associated with making arrangements to rent the premises, and to arrange payment of stamp duty. Most real estate agents also charge one weeks rent to the landlord for costs associated with drawing up the contract and letting the premises. In all other states (except W.A.) the letting fee has been prohibited under the respective Residential Tenancies Acts. Out of 60 respondents, 12 (20%) had paid a letting fee of between $20.00 and $170.00. (2 of whom had paid the fee to a landlord).

The issue of letting fees has been referred to the Auctioneers and Estate Agents Council, who have indicated they do not have a legal opinion on whether such a practice is lawful. As many housing assistance services, receiving government funding, pay this fee for prospective tenants, the matter has now been referred to the Attorney General by the Tenants Union of Tasmania for some decision as to whether charging of the fee is contravention of Section 30 of the *Auctioneers and Estate Agents Act 1959*, and therefore should be discontinued.

Tenancy Contracts

14 questions were included on tenancy contract in order to ascertain:

(i) How frequently written agreements are entered into.

(ii) The extent to which the present forms of agreement can be said to be freely negotiated.

(iii) Whether tenants generally receive a copy of the agreement.

(iv) The tenant's perception of the contract.

It should be noted, 41.7% of the sample did not sign a written agreement, and a further 6.6% did not know whether they had signed one or not. Of those signing an agreement two thirds were of the view that they were given sufficient opportunity to consider it. The most frequent period for a lease was between 6 and 12 months. (17% of respondents had signed a lease for less than 6 months).

18 respondents (58%) found the contract was easy to understand, 8 (25.8%) found that it was difficult in parts, one tenant found it very difficulty to understands and 4 respondents were not able to ascertain whether they found it difficult or not.

Two thirds of the respondents did not receive any explanation about the contract. One third had tried to add or change terms in the contract (in relation to such matters as pre-existing property damage, installation of their own furniture, extended lease, and a more restricted right of entry by the landlord). Half of those attempting to change lease conditions had been partially successful.

It was difficult to ascertain from the responses information about the type of agreement that had been signed by the tenants. 13 (41.9%) indicated they had signed a real estate contract, but it appears that the rest of the respondents did not know the nature of the document they had signed. None of the respondents surveyed had knowingly signed a Consumer Affairs Council Lease or a Tenants Union of Tasmania Agreement.

Half of the respondents indicated they had received a copy of the lease, a further 19% indicated that they had not, and a further 29% did not know whether they had received a copy or not. Only 5 (8.3%) had any choice in whether to have a contract, a further 43 (71.6%) had no choice, and 12 (20%) did not know whether a choice was available or not. From this limited data it seems fair to question the doctrine of freedom of contract when only 8.3% of the sample were given any choice. In answer to the question "Who do you think benefits most from tenancy contracts?": 31% believed landlord and tenant benefitted equally, 46% believed the landlord benefitted, one person felt the tenant benefitted, and 20% did not know which party benefitted most from the agreement. It would be fair to conclude from this, there is no great confidence indicated by tenants, as to the value of the tenancy contract to the tenant party.

Rent Receipts and Increases

The vast majority of tenants in the sample (86.6%) paid rent fortnightly, and a further 8 (13.4%) pay weekly. The range of rent paid by the tenants was between $40.00 for a room in a share house, to $160.00 for rent of a separate house. Most of the respondents (71.6%) paid rent by cash, 11.6% paid rent by cheques, and a further 15% pay rent into a savings or cheque account. 71% of tenants, receive a full receipt but the remaining 30% do not. Of those receiving receipts, 33 (73.3%) receive a receipt immediately, while others wait generally up to a week.

In 13.3% of the households surveyed, the rent had increased in the last 12 months from between $5.00 and $30.00. Half of these received notices of the increase of between one and 2 weeks, and the remainder between 2 and 4 weeks. Where reasons were supplied, in 5 of the 8 cases, they related to increasing costs in maintenance, upgrading plumbing and increasing bank interest rates. When reasons were supplied most tenants considered the rent increase was fair.

Repairs and Maintenance

The major problems of the common law position in relation to habitability and repairs have been discussed at Chapter 3.6.

The repair questions were designed to test the practical effect of the common law, in relation to establishing how quickly and promptly (if at all) repair problems could be remedied. Several questions were included to find out how many tenants had spent their own time and money on repairs. In addition, the repair questions were aimed to ascertain the tenants' degree of satisfaction with upkeep and maintenance by the owner.

In 26 cases (43%) the landlord or agent had promised to do repairs when the tenant moved into the premises. Respondents were asked to identify these repairs (up to 3) and indicate whether or not they had been completed. A list of repairs is outlined in Appendix 1.

In respect of the first repair, 24 respondents indicated that the landlord had promised to repair some defect in the premises. Of these 16 were completed: 6 within one week, 4 within a month and the remainder completed within a period of 16 weeks to 6 years. In another 14 cases, the landlord had indicated that a second repair would be completed and of these 9 were in fact completed: 3 within a week, a further 2 within 6 months and the remainder took over 6 months to complete. In 8 cases respondents indicated that a third repair was necessary, and 7 of these were completed over a lengthy time frame. In summary, of the 45 repairs promised at the commencement of the tenancy, 31 were completed.

In respect of repairs requested since moving in, responses indicated a total of 48 repairs had been requested of which 26 had been completed. In respect of the 22

repairs not completed, 8 of these had been requested over 3 months ago, and a further 8 had been requested for over 6 months. In a minority of cases (7) repairs had been refused, 4 of these without reason.

The questionnaire also sought to determine whether tenants had spent their own time and money on repairs. 35% of tenants had spent money on repairs, most frequently an amount between $1.00 and $49.00. Tenants provided a range of answers to why they had spent their own money, including the size of the job, the fear of refusal and the length of time they had been waiting for the repair to be done. One third of tenants has spent their own time on a range of repairs from a minimum of one hour of total to countless hours.

43% of the sample indicated they were not satisfied with the way the landlord maintained the dwelling, principally for: allowing houses to deteriorate without attending to necessary repairs, failing to promptly attend to defects causing annoyance and inconvenience, and failing to respond to repeated requests for repairs to be undertaken.

Two thirds of the sample did not know they could approach the Housing Department to arrange an inspection of the house if they felt it was substandard.

Privacy and Quiet Enjoyment

Over two-thirds (42%) of the respondents indicated that the landlord had visited the premises during the tenancy.

The following table sets out the frequency of such visits:

Frequency of Landlord/Agent/Caretaker Visits	
Daily	3
More than once a week	2
Weekly	7
Fortnightly	5
Monthly	2
Every 2 - 3 months	9
Every 3 - 6 months	8
Don't know	3
Once only	4

In 45% of cases the landlord had visited without giving adequate notice, and in 21% of cases it was believed that the landlord had entered without permission. Half of the respondents define the landlords visit as necessary and no bother, but 10% felt the visits represented an invasion of privacy. The table of responses to this question is set out below:

Question: How Would you Best Describe the Landlord/Agent/Caretakers Visits?	
Necessary and no bother	22
Necessary but a bother	3
Unnecessary but no bother	6
Unnecessary and a bother	4
An invasion of my privacy	6

In summary, the high percentage of respondents indicating that the landlord had visited without adequate notice is of concern, and clearly points to the need for legislation introducing requirements for firstly, reasonable notice and secondly, stipulation for grounds of entry.

Also of concern is the finding that in over 20% of cases the tenant believed (whether correctly or not), that the landlord had entered without permission. This suggests the need for provisions in any new residential tenancies Act to explicitly stipulate the landlord should enter the premises only in accordance with the Act.

Security of Tenure

The purpose of including eviction questions was to ascertain the extent to which tenants had been evicted from previous dwellings. Only 38 of the 60 original respondents had any previous experience in the private rental sector. Of these 13 had previously been evicted. The number of times an individual had been evicted ranged from one to 15 occasions. Reasons for eviction included: house being sold, the owner returning unexpectedly from overseas, sexual preference, rent arrears and noise. 3 people were evicted in a matter of 1 to 4 hours, and the other were given notice ranging in time from 2 to 30 days.

Discrimination

One third of the sample believed that they had been discriminated against in their access to housing for a range of reasons including: race (2), income (8), age (6), sex (6), children (7), student status (4), pets (6), sexual preference (3). Most of the respondents indicated that they felt the discrimination was unfair.

Use of Self Help Measures

Several questions were designed to obtain information about use of the common law remedies of "peaceful re-entry" and "distress". 4 of the Respondents had experienced seizure of their chattels. Only one respondent was successful in obtaining their belongings again. 5 respondents had been locked out of the premises by the landlord, and 3 had subsequently broken in and removed their possessions. 2 respondents took no further action.

In summary, it appears that the self help remedies are used in a small percentage of cases. It is difficult to gain a reasonable estimate of the extent of the use in Tasmania, because of the small sample size.

Awareness of Rights and Services

Respondents indicated that they would use a variety of agencies to obtain help with the tenancy difficulties. Over two thirds of the sample said that they would contact the Tenants Union of Tasmania, one third said they would go to the Community Legal Centre, and the rest indicated they would use a variety of agencies including the A.L.A.O., Consumer Affairs Council, Real Estate Agents or lawyers.

Only one half of those surveyed had heard of the Small Claims Division, and only 3 people had been before the Tribunal on tenancy matters.

Tenant Views on Law Reform

The final question was included with a view to obtaining information on the major reforms which tenants would regard as important and desirable to implement. In general, respondents identified a range of reforms, most frequently being:

(i) Legislation in relation to the amount, holding and return of security deposits.

(ii) Government action to deal with the problem of the high cost of rent, relative to tenant income.

This section presents a summary of the respondents views on desirable changes to the law. The responses have been categorised under the major areas requiring reform:

- *Bonds*

- "Would like to see a central holding account for bond money, and some sort of compulsory inspection of premises by both prospective tenant and landlord/agent, before renting, and compulsory forms to sign re the state of premises on renting."
- "Bond Board - Small Claims Tribunal, is good in theory but when the landlord lies it becomes a waste of time."
- "Part payment of bond rather than lump sum payment; bond incorporated into weekly rent."
- "Bonds plus stamp duty, lease fee and 2 weeks rent is too much for any one person to pay."
- "Separate bond organisation which would invest the bond and return of the interest."
- "Some government agency to accept bonds on behalf of landlords. Bonds, plus interest, should be repaid after inspection of the rented property by a government official, and not by the landlord."
- "Are bonds necessary?"
- "Bond is frequently too high and is often kept by the landlord. I suggest that bonds should be held independently and an independent assessment be made concerning the bond return."
- "Letting fees and stamp duty create additional costs for people on low incomes."

- "Assistance with paying bonds."
- "I paid $1,000.00 bond as I was a single woman with 3 children and I needed a roof for us."

• *Tenancy Agreements*

- "Our lease is too strict on what you can and can't do - for eg, parking the car in the driveway is not allowed in our lease."
- "Leases which protect both the landlord and tenant."
- "The introduction of a number of standard leases that are well known."
- "More flexibility in leases."

• *Privacy*

- "To ensure the privacy of the tenants."
- "I believe if you pay your rent the property should be yours to live in undisturbed."
- "The landlord kept banging on the door and one day he took our dog."
- "The landlord should not have the right to enter unasked."
- "My recent experience has been that the real estate agent gave all the rights to the owner as far as he access to the property went. I was given no privacy. I had never had this experience before in N.S.W. ie the owner being allowed the premises whenever he pleased."
- "Strict guidelines on the landlord's visit to the property."

• *Rent - Rent Increases*

- "Some type of system or code by which the amount of rent (and bond) charged by the landlord could be governed."
- "In almost every rented place I have lived in (18 houses and flats) the rent has been $20 - $30 too expensive for what you get."

- "Rent control, so rent can't be doubled on 3 weeks notice (on your birthday)."
- "Cheaper rent."
- "Cost of rental, not only to myself as a single person but for the average family."
- "Control over how much rent can be charged - value for money!"
- "Fair rental legislation."
- "I think that the amount of rent should be looked at more closely for the sort of dwelling. Most rents are far too high, for the sort of places they are."

• *Discrimination*

- "To stop discrimination against people with children or on benefits."
- "Pets should be allowed."
- "Anti-discrimination legislation on age, sex, race, income."
- "Not to be discriminated against; that pets are allowed; that families with younger children can rent more modern homes and pay reasonable rent for them in private accommodation."
- "A law against discrimination. A fair go for young people, regardless of race, sex or religion."

• *Tenancy Tribunal*

- "A Tribunal set up to hear your problems."
- "Somewhere to go when you've got hassles with the landlord."

• *Repairs - Maintenance*

- "Laws on cleaning premises between tenants and maintenance."
- "Mandatory standards for housing (easily enforceable)."
- "Repairs done as requested."

- "If the landlord does not attend repairs within a reasonable time there should be somewhere to complain."
- "The landlord should have to inspect the premises and look after the place and not let it run down."
- "Provision of the house in good condition with clean carpets and cupboards."

• *Security of Tenure*

- "I was kicked out with two weeks notice because the owner wanted to come back from overseas earlier. There should be laws making the landlord give you a fair length of time to find another place."
- "At least 3 months minimum notice if the house is being sold."

• *Other Issues*

- "More affordable housing for young people."
- "Tenants need more legal protection and more information on their rights."
- "More information about tenants rights."
- "Laws that clearly define the rights and responsibilities of tenants and landlords."

CHAPTER 5

PROCESS OF REFORM IN TASMANIA

5.0 Introduction

This chapter provides an overview of the process of law reform in Tasmania from the first substantial moves taken by the Law Reform Commission in 1977, until the election of the Labor government in Tasmania in May 1989.

5.1 Law Reform Commission, Report No. 19: Report and Recommendations on the Common Law and Statute Law in Tasmania relating to Residential Landlord and Tenant Law (1978)

In November 1976 the Attorney General referred the issue of the landlord tenant reform to the Tasmanian Law Reform Commission. The Commission was asked to consider desirable changes to the law and report on the establishment of a special tribunal, to informally deal with disputes arising between landlords and tenants in respect of residential tenancies matters.[1] The Committee (appointed by the Commission) received submissions from a range of organisations and individuals, including the Consumer Affairs Council, the Tenants Union of Tasmania, the Real Estate Institute and the Law Society of Tasmania. The Committee also considered a wide range of interstate and overseas materials pertaining to reform of residential tenancies law.

In December 1977 the Law Reform Commission tabled its report on investigations. It was of the opinion that the current law provides very little protection for the residential tenant, and that substantial modifications were needed in order to "remove archaisms and create a basis for equal status in negotiation."[2] The major

recommendations of the Commission's report are set out and addressed in this section.

1. Resolution of Disputes

The Committee recommended the establishment of a residential tenancies tribunal, to be constituted by a Magistrate or single government appointee.[3] The proposed tribunal would be given power:

> "To make orders for possession of the premises, to award damages for breach of covenant, to assess, and order payment of arrears of rent, to determine the disposition of security deposits and generally to make such orders as may be necessary to give effect to the provision of the new legislation."[4]

In addition, the Committee recommended appointment of a Rentalsman who would have a number of functions, including conciliation between landlord and tenant parties (subject to their consent). The Rentalsman would attempt to bring the opposing parties to a compromise, without the necessity for formal adjudication.[5]

Two recommendations by the Committee in relation to tribunal hearings require further comment: first, the proposal that either party should be entitled to be represented by a legal practitioner (although neither side may claim legal costs from the other party),[6] and second, the issue of whether a right of appeal should be allowed from a decision of the tribunal to the Supreme Court. It is submitted that the presence of lawyers at tribunal hearings should be restricted, and that as far as practicable parties to a hearing should be required to present their own case. The evidence from tribunals which have allowed legal practitioner to represent parties is as follows:

(1) That hearings have a tendency to become over-formal and legalistic.[7]

(2) That the method of presenting evidence and arguing positions tends to frustrate the objectives of resolving cases by conciliation and agreement.[8]

(3) It is more likely that due to the expense of obtaining legal advice, the landlord is most likely the party to benefit from the recommendation.[9]

The Commission did not deal with the issue of whether a right of appeal should be allowed from a decision of the tribunal. It is submitted that the right of appeal should be limited to questions of law, rather than fact.[10]

The Commission did not recommend establishment of a body to administer the Act, supervise its operation, and provide an advisory service for both landlords and tenants. The Committee was unanimously opposed to the establishment of a separate and independent body for 5 main reasons:

(1) A bureau would be an expensive creation, both in terms of initial cost and continuing provision of manpower and services.

(2) The work would duplicate many of the functions of the Tenants Union of Tasmania.

(3) Free or subsidised legal assistance is available for impecunious persons.

(4) The tenants would be given a synopsis of the main sections of legislation at commencement of tenancy.

(5) The Rentalsman would be required to give information and advice on many aspects of the legislation.[11]

The opposition to establishing such a body is probably the major weakness of the Committee report. Legal reforms to assist tenants are likely to be of little value if tenants are not aware of their rights or lack access to informed services. It is important that independent and neutral advice is available from the department responsible for carriage of the Act. Therefore, it is necessary for the nominated

department to be pro-active in establishing an education program to develop public awareness and understanding of the provisions of the Act, and of the rights and responsibilities involved in tenancy agreements. Most recent reports examining the operation of residential tenancy tribunals have recommended an expansion rather than a limitation on the role of education. In its 1989 report the Rental Bond Board of N.S.W. reported on its expanding role with the provision of tenancy information services.[12] The N.S.W. program is broadly based and centres on promoting understanding between landlords and tenants, and provides counselling and conciliation where necessary. The recent review of the Residential Tenancies Review Steering Committee (Vic) also stressed the importance of the tenancy education role.[13] Merely providing parties with a synopsis of the main sections is, in itself, unlikely to greatly increase knowledge, particularly among tenants with poor literacy skills, or those of a non English speaking background.

Application of Contractual Principles

The application of contractual principles to residential tenancies has been addressed at some length in Chapter 2. The recommendations of the Committee were those commended by Bradbrook, in his assessment of the Law Reform Commission's Report.[14]

Security of Tenure

The Committee made a number of recommendations departing from the entrenched common law position. In summary, these recommendations:

(1) Prescribe 10 acceptable grounds for which a Notice to Quit could be issued.

(2) Prohibit retaliatory evictions (although the Committee limited the period of presumption of retaliation to 3 months).

(3) Require the landlord to give 2 months minimum notice period in respect of ending a periodic tenancy.[15]

The conflict between housing as a "right" and housing as a "commercial commodity" is evident in the way in which the Committee attempted to deal with the issue of security of tenure. The basic conflict here is between the need of a tenant to secure housing and protection against arbitrary eviction, and the right of people with capital to use or dispose of it in an unfettered way.

> "Members of the Committee found some difficulty in reaching a unanimous decision as to the extent to which tenants should be entitled to security of tenure of premises against the owners wishes. To some of us the idea of forcing a landlord to endure a tenant whom he wished to evict seemed philosophically unpalatable. However, it was generally recognised that whilst a lease is usually a simple commercial transaction to a landlord, it represents the source of a significant part of the security and happiness of the average tenant. In short, as one author has put it, it is matter of status rather than contract so far as the tenant is concerned. Secondly, it was also recognised that a carefully drafted scheme providing on the one hand, a table of circumstances in which the landlord was entitled to terminate a tenancy, and on the other, a list of conditions which must be fulfilled by a tenant seeking security of tenure, could preserve to the tenant an acceptable measure of security without depriving the landlord of the right to deal with his own property in a reasonable manner."[16]

The Committee proceeded to adopt the grounds suggested in the Sackville Report with some additions and modifications. In line with the Sackville Report the Committee also proposed a streamlining of eviction procedures, for recovery of possession. Under the present system the landlord must serve a valid Notice to Quit, and on expiration must apply to the Supreme Court for a Writ of Possession. If no defence is lodged by the tenant, judgment by default may be entered 8 days after service of the notice. If the tenant enters a defence, he/she must provide particulars of the defence within 14 days, and if these are not satisfactory, a summary judgment

may be entered. If the particulars suggest a good defence, the case is set aside for hearing. Once the court issues a Warrant for Possession it is then executed by the bailiff. Under the current system the tenant can stall an eviction for some time. Under the proposed Committee amendments, a Notice to Quit would specify the date upon which possession is required, the date on which an application will be made to the tribunal for an order for possession if the premises are not vacated, and the grounds on which the notice proceeds. In other words, the Notice to Quit and the Summon for Possession would be combined.[17] This is one proposal that makes residential tenancies law reform attractive to the real estate and landlord interest groups.

Right to Privacy

The Committee recommended that the landlord should only be entitled to enter in limited and clearly defined circumstances, and that parties should not be able to contract out of such statutorily defined circumstances. The circumstances recommended by the Committee are:

(a) "In an emergency.

(b) During reasonable hours to show the premises to a prospective tenant, after giving a valid Notice to Quit, or receiving a Notice of Intention to Quit and upon giving reasonable notice to the current tenant.

(c) During reasonable hours to inspect the state of the premises upon giving of reasonable notice to the tenant (but not more than once in every 3 months).

(d) During reasonable hours to permit a valuer, prospective mortgagee or tradesman to inspect the premises for the purposes of appraisal, or making repairs, upon giving reasonable notice to the tenant.

(e) If the landlord believes on reasonable grounds that the premises have been discarded."[18]

It is submitted that the grounds cover the situations necessitating entry by the landlord, but what is "reasonable" in relation to both the hours and the period of notice needs to be explicitly stated. Bradbrook has pointed out that the effect of the proposed recommendations are weakened by the Committee's failure to propose that any breach should be regarded as an offence punishable by a fine.[19]

Discrimination

The Law Reform Committee recognised the extent of discrimination placing most emphasis on discrimination against people with children. Although the Committee found such discrimination practices to be undesirable, it made no recommendation as to how legislative provisions might address the problem. The Committee pointed to, what it considered to be, the problems of introducing anti-discrimination provisions into residential tenancy legislation. The reasons were:

1. Such legislation could result in a diminution of construction of houses suitable for families.[20] Whether an anti-discriminatory clause would effect the construction of housing for families is questionable. If this were the case, perhaps some incentives could be provided to encourage such construction, as has been done in Canada. It has also been pointed out by Bradbrook that:

> "While it is essential that the financial position of the landlord be safeguarded, the system of security deposits, already in almost universal use in Tasmania, is designed to protect the landlord against the possibility of damage caused to the premises by the tenant or his family. So long as these security deposits remain lawful, it is submitted that there is no valid reason to suppose that developmental capital will be diverted to other investment sources."[21]

2. It is not unreasonable that landlords should exclude children from certain types of existing accommodation, as for example, flats or units in a retired persons complex and expensively furnished flats or small flats.[22]

It would seem reasonable that there are some forms of housing that could be justifiably exempt from anti-discrimination legislation on the grounds that they are unsuitable for certain groups. Some allowance could be made for this, rather than a blanket refusal to take action, which allows landlords to discriminate where housing is suitable.

3. Anti-discrimination is essentially a matter of broad government policy and as such should apply, if at all, to situations involving social intercourse and interaction.[23]

While this may be true it should not prevent some provisions being made in any proposed residential tenancies legislation, as this is one of the major areas in which discrimination exists.

4. There is doubt whether even a carefully drawn up piece of legislation relating to landlords and prospective tenants could effectively prevent discrimination when there are apparently so many applicants for each vacant residential unit. It is difficult to see how the landlord could not avoid the consequences of such legislation on a number of plausible pretexts.[24]

The difficulty of enforcement should not be a bar to introducing this kind of legislation. Although discrimination is essentially a subjective state of mind, the law can effectively specify certain kinds of conduct deemed to be discriminatory.

The Victorian Community Committee Report attempts to do this by:

1. Specifying the grounds of discrimination.
2. Placing the onus on the defendant to provide the ground of refusal.

3. Prohibiting discriminatory advertising of rented premises.
4. Prohibiting specific discriminatory enquiries.
5. Placing the onus on the defendant to prove such enquiry was not made to determine whether or not to let the premises.[25]

Because of the difficulty in determining discrimination cases the Community Committee recommended that such cases should be dealt with by a specialist court rather than the ordinary courts, in order to ensure the necessary specialist skills, consistent decisions and sensitivity.

It is submitted that all obligations and rights, relevant to the landlord/tenant relationship, should be contained in any new residential tenancies legislation, including the obligation not to discriminate.

Summary of the Law Reform Commission Report

The Law Reform Commission Report represents the first major re-evaluation of residential tenancy law in Tasmania. Despite some limitations, it nevertheless represents a major departure from the current entrenched common law rules relating to residential tenancies.

5.2 Developments Since the Law Reform Commission Report

The Law Reform Commission Report received qualified support from tenant interest groups, notably Shelter (National Housing Action) and the Tenants Union of Tasmania. The A.L.P Legal Policy Committee (Tas.) supported the Commission's recommendations with some minor modifications,[26] and the matter was referred to the Attorney General to produce a new residential tenancies draft bill. Although the government indicated it was its intention to reform the law, no draft bill was produced

for public comment during the ALP's term of office. The ALP lost government in Tasmania in 1982, during a period of intense and emotive division in the community over the proposal to dam the Franklin River. The ALP's concern with pressing environmental issues may partially explain the absence of any reformative moves in the residential tenancies area during this period.

Nevertheless, as a result of the government's stated intention to introduce legislation following the Law Reform Commission Report, the Real Estate Institute and individual agents stepped up a campaign to block the legislation. In 1979 letters were sent to most Ministers, landlords and tenants warning them of the possible effects of the legislation. One major company wrote to all landlords for whom it handled property urging them to oppose reforms which would "curtail their right to deal with their property as they wished". The Real Estate Institute contended that:

> "If legislation is introduced in Tasmania it would place an intolerable burden on landlords and inevitably reduce the returns they could expect from residential rental investments."[27]

In describing what were essentially modest reforms of the Law Reform Commission, the Managing Director of a major real estate company stated:

- "A Residential Tenancies Tribunal would be formed, with powers to enforce the Act and to introduce rent control;
- Landlords would be forced to reduce what a Tribunal may consider to be excessive rents;
- Limit the frequency of rent increases to once a year;
- Set minimum periods of notice which would give tenant greater security of tenure, and make it harder for landlords to remove unsuitable tenants;
- Limit the value of security deposits to 2 or 3 weeks rent;

- Hold all security deposits paid by tenants with the power to decide whether or not they are refunded at the end of the tenancy;

- Restrict the right of entry of the landlord into the rented premises;

- Arrange necessary repairs and bill the landlords for the cost."[28]

Such comments, which appear to suggest a strong ideological objection to government regulation, substantially misrepresent the substance of the recommendations. Given the generally low level of awareness in the community concerning tenancy law, such inaccurate and misleading comments have the capacity to generate a divisive community response.

In 1983 representations concerning the need for law reform were made to the new Liberal government by tenant interest groups. These were not received favourably, and state funding for the Tenants Union Advisory Service was discontinued.[29] The Liberal government took the view that the housing market should be given an opportunity to "self regulate", and expressed concern that residential tenancies legislation would restrict the amount of private rental stock.[30] In line with its "self regulation" approach to residential tenancies law reform, the government produced a model fair lease under the auspices of the Consumer Affairs Council.[31] The lease is currently available from the Government Printer for a cost of $2.50. The lease comprises 3 sections: Part I, which is the actual tenancy agreement itself; Part II, which contains the terms and conditions of the residential tenancy agreement; and Part III, which is the Premises Condition Report.

Although there are some problems with the drafting of various provisions[32] and several omissions (notably that the distress remedy and the right of peaceful re-entry are not prohibited), the lease represents a much fairer and equitable agreement, than

most of the standard real estate and private leases. Its use is commended by the Tenants Union of Tasmania and other community based housing organisations. The major problem with the lease is that its use is purely voluntary, and it has not been adopted by any of the major real estate companies operating in the state. A voluntary code of ethics between landlords and tenants is of no real practical relevance, where one party wishes to comply and the other does not.

In 1987 the Attorney General announced his intention to introduce legislation making use of such a lease mandatory, and extending jurisdiction of the Small Claims Division to cover all tenancy matters. The Attorney General's submission was rejected by Cabinet, and no legislation was forthcoming.

On May 13, 1989, the ALP and 5 Green Independents were elected to the House of Assembly and hold government on an ALP/Green accord. The government has indicated its intention to introduce legislation reforming the law in relation to residential tenancies. The Government is currently preparing three discussion papers dealing with residential tenancy agreements, bonds and dispute resolutions.[33]

5.3 The Effect of Proposed Residential Tenancies Legislation on the Availability of Rental Housing Stock

One of the arguments frequently advanced against tenancy law reform, is that any changes to the "status quo", in relation to the balance of rights and obligations between the parties, will have a negative effect on the supply of rental housing. It is worth considering these arguments, because they are likely to re-emerge during the process of introducing any new legislation.

Two Australian reports have dealt with this issue at some length. The first of these is a report commissioned by the Ministry of Housing in Victoria (1983) entitled A Review of the Private Rental Housing Market in Victoria, and its Implications of

Tenancy Law Reform. The second report is a market research study, commissioned by the South Australian Department of Public and Consumer Affairs in 1982. The title of the report is Market Research Study - Assessment of Knowledge and Attitudes to the *Residential Tenancies Act*, of Landlords and Tenants. A brief summary of the major findings of both studies is outlined below:

(1) Victorian Ministry of Housing Report (1983)

In October 1983 the Ministry of Housing reported on a review of the private rental market in Victoria and the implications for tenancy law reform. The review team produced a detailed 3 volume report which dealt with supply and demand aspects of rental housing, investor behaviour and attitudes, and interstate and overseas experience. In summary the major findings of the review were:

(i) There was little evidence to suggest that the introduction of the *Residential Tenancy Act 1980 (Vic)* had caused any impact on the supply of private rental housing.[34] In fact the study found that the tight rental market conditions in Victoria were caused by a rapidly increasing demand rather than contracting supply.[35]

(ii) Data collected by the study team suggests that there is a low level of awareness and knowledge of the present legislation, especially amongst overseas born landlords. Close to one third of all landlords surveyed had never heard of the Residential Tenancies Act.[36]

(iii) Among landlords surveyed who had an opinion of the Residential Tenancies Tribunal, 60% said they were satisfied with the Tribunal. More than 50% of real estate agents surveyed also said they were satisfied.[37]

The review team found that the most relevant factors in influencing investment in the private rental market were the *attraction of capital gains* combined with the *taxation benefits of rental housing investment.*[38] A table ranking the importance of factors influencing investment decisions in residential tenancy property is contained in Appendix 6.

In summary, the study suggests introduction of residential tenancies legislation is in practice unlikely to have any impact on the supply of private rental housing.

(2) Market Research Report 1982 (S.A.)[39]

In 1982 the Department of Public and Consumer Affairs in South Australia commissioned a market research report to canvas the extent of knowledge about and attitudes towards the *Residential Tenancies Act 1978-81.* In summary the major findings were:

(i) 67% of landlords surveyed said that the *Residential Tenancies Act* should be retained, 24% said it should be dropped and 13% were unsure. 83% of tenants surveyed said the *Residential Tenancies Act* should be retained, 8% said it should be dropped and 9% weren't sure.[40]

(ii) Landlords identified the following factors as major contributors in a decrease in the building of rental properties:

(a) Building costs.

(b) Return on investment.

(c) Interest rates.

Tenancy damage and the *Residential Tenancies Act* were identified as minor concerns.[41]

(iii) Findings also indicated marked cultural differences in understanding of, and support for the legislation, and on general questions on whether the government should be involved in regulating a private rental sector.[42] This points to a need for early publicity and education about proposed changes, to be available in a range of appropriate community languages.

Summary

It appears that the introduction of residential tenancies legislation in South Australia and Victoria has had no impact on the amount of rental housing. In analysing investor behaviour, both studies suggest that the most important influences on decisions to invest are:

- Trends in the rate of growth in capital gains and locational aspect of such gains.
- Taxation policies.
- The attractiveness of alternative investment opportunities.
- Current and expected rental income.
- The cost and availability of finance.
- The cost and availability of land.
- Confidence in the economy generally.

- Town planning controls.

Tenancy law is a consideration in investment decisions, but it is not a major determinant of investment behaviour. For tenancy law reform to have any major impact on investor confidence in the private rental market, it would need to be demonstrated that the proposals had a direct capacity to effect the most critical influences on investors behavior - namely the level of capital gain to the landlord. None of the Law Reform Commission recommendations or those of the ALP Legal Policy Committee, will impact on the expected level of capital gain of rental property.

FOOTNOTES - CHAPTER 5

1 Law Reform Commission Report and Recommendations on the Common Law and Statute Law in Tasmania Relating to Residential Landlord and Tenant Law, Report No. 19, 1978, at p. 3.

2 Ibid, p. 9.

3 Ibid, (para. 8), p. 11.

4 Ibid, (para. 41), p. 20.

5 Ibid, (para. 7), p. 11; (para. 41), p. 19.

6 Ibid, (para. 41).

7 This has been the reported experience of the Human Rights and Equal Opportunities Commission, and is discussed in Chapter 3.7. Similar observations have been made in relation to the operation of the Residential Tenancies Tribunal in Victoria. See Creek, S., Tenants Union of N.S.W., Report of the Residential Tenancies Project (1987, and Ministry for Consumer Affairs, A Review of Residential Tenancies Functions and Services (1989), op cit, Chapter 8.

8 See Annual General Report of the Human Rights and Equal Employment Opportunity Commission 1987-8, at p. 26.

9 See Bradbrook, A. "Residential Landlord Tenant Law Reform in Tasmania", (1978) 6 University of Tasmania Law Review, 83 at p. 84. Bradbrook's paper provides a review of the Tasmanian Law Reform Commission Report No. 19 and examines the major strengths and weaknesses of the report.

10 Bradbrook, op cit, argues that a strong case should be made out for appeals to be allowed to the Supreme Court on questions of law, particularly since inevitable disputes are likely to arise as to the proper interpretation of any new residential tenancies law.

11 Law Reform Commission, Report No. 19, (para. 40).

12 Rental Bond Board of N.S.W., Annual Report for the year ended 30th June, 1989.

13 The recent Victoria Review (1989) recommended the establishment of a Tenancy Advice Service Branch, within the Client Services Division of the Ministry, with functions involving a whole range of tenancy related support (See recommendation 36 and 37).

14 Bradbrook, A.J., "Residential Landlord Tenant Law Reform in Tasmania", op cit, pp. 85 - 86.

15 Law Reform Commission, Report No. 19, op cit, (para. 10 and 11).

16 Ibid, (para. 10).

17 Ibid, (para. 33).

18 Ibid, (para. 12, and 13).

19 Bradbrook, A.J, "Residential Landlord Tenant Law in Tasmania", op cit p 88

20 Law Reform Commission, Report No. 19, op cit, (para. 65).

21 Bradbrook, A.J., "Residential Landlord - Tenant Law Reform in Tasmania", op cit, at p. 93.

22 Ibid, (para. 65).

23 Ibid, (para. 65).

24 Ibid, (para. 65).

25 Report, Community Committee on Tenancy Law Reform (Vic), op cit, p. 79.

26 The minor modifications relate to security deposits, substandard housing (compulsory acquisition provisions), and subletting (Housing Department tenancies).

27 "The Mercury" (Tasmanian Daily Newspaper); February 11, 1980.

28 Ibid.

29 Until the Liberal government took office, the Tenants Union was funded partially by the Premiers Department (Salaries) and the Department of Social Welfare (Administration costs).

30 Correspondence to the Tenants Union from John Beswick (Lib.), Minister for Consumer Affairs, 1987.

31 The lease is contained in the Appendices at Appendix 2.12

32 The Tenants Union of Tasmania wrote to the Attorney General (Mr John Bennett) recommending a number of modifications to the Consumer Affairs Council Lease (to improve the clarity of particular section, modify particular sections, and add additional clauses). The Tenants Union also expressed concern that the two tier structure of complaint resolution (particularly if the Small Claims Division was understaffed) would result in lengthy delays, defeating the effectiveness of the system in providing redress for tenant/landlord disputes. (See Appendix 4).

33 The first of these papers has recently been released by the Consumer Affairs Council for public comment.

34 Ministry for Consumer Affairs: A Review of the Private Rental Housing Market in Victoria, and Implications of Tenancy Law Reform, October 1983, Vol. 1, Summary Report at (vi).

35 Ibid, Vol. I, Overview, p.1.

36 Ibid, Vol. II, at p. 208. Of all landlords surveyed 27.8% had never heard of the *Residential Tenancy Act*, 6.3% had only heard the name before, 29.2% only new very little about it, and 36.7% were reasonably familiar with it. Only 18.2% of overseas born landlords were familiar with the Act.

37 Ibid, Vol. I, Summary Report at (p. vi).

38 Ibid, Vol. II, at p. 178.

39 Peter Gardner & Associates, Market Research Study: Assessment of Knowledge and Attitudes to the *Residential Tenancies Act* of Landlords and Tenants, produced for the Department of Public and Consumer Affairs, (May 1982), at p. 11.

40 Ibid, at p. 11.

41 Ibid, at p. 59.

42 Ibid at pp. 11, 12 and 70.

CHAPTER 6

REFORM IN OTHER AUSTRALIAN JURISDICTIONS

6.0 Introduction

The first moves towards reform of the law in relation to Landlord and tenant occurred in 1975, with the publication of reports produced by the Commission of Inquiry into Poverty. Two reports have had substantial impact on reform of the law. The first of these is Professor Ronald Sackville's report Law and Poverty in Australia. In this report he makes a number of recommendations for codification and substantial modification of the existing common law rules in relation to landlords and tenants, and for the establishment of a new tribunal with jurisdiction to hear and determine tenancy disputes. The second major report is that of Dr A J Bradbrook, who produced a comprehensive and detailed analysis of the existing law, and evaluated a number of reform options based on legislation in overseas jurisdictions. Dr Bradbrook's report is entitled: Poverty and the Residential Landlord - Tenant Relationship. Both reports recommended the introduction of new residential legislation in all states.

6.1 A Brief Overview of Residential Tenancies Legislation in Other Australian States

This chapter discusses and analyses aspects of the new residential tenancies legislation introduced in other Australian jurisdictions since 1978. The Residential Tenancies Acts represents an important development in the law relating to landlord and tenant, for the legislation substantially abolishes the common law rules on landlord and tenant law. All states have now introduced legislation regulating the relationship between landlord and tenant, and setting out new housing codes which are intended to provide fair and reasonable protection to the interests of both parties.

The current legislation governing residential tenancies in Australia in 1989 is set out in the following table.

RESIDENTIAL TENANCIES LEGISLATION IN AUSTRALIA

South Australia:	*Residential Tenancies Act, 1978 - 81*
Victoria:	*Residential Tenancies Act, 1980*
	Caravan Parks and Movable Dwellings Act, 1988
New South Wales:	*Rental Bonds Act, 1977*
	Residential Tenancies Act, 1987
Western Australia:	*Residential Tenancies Act, 1987*
Queensland:	*Residential Tenancies Act, 1975*
	Rental Bond Act, 1989
Tasmania:	*Landlord and Tenant Act, 1935*
	General Common Law Principles
A.C.T.	*Landlord and Tenant Ordinance 1949*
Northern Territory	*Tenancy Act, 1979*

This chapter gives a brief initial overview of the legislation in each state, before examining details of some of the major aspects of the legislation. The substantive content of the discussion is confined to legislative reforms in South Australia, Victoria, New South Wales and Western Australia (apart from the introduction in Queensland (1989) of a Rental Bond Board).

South Australia

The Residential Tenancies Act, (1978-81) was the first piece of Australian legislation

to establish a comprehensive code for residential agreements modifying the common law position. The Act regulates the grounds and procedures for terminating a tenancy and eviction; regulates rent increases and excessive rents; and establishes a system for the lodgement and return of bond money. Investigatory, research, educational, advice and prosecution (in respect of infringement functions) rest with the Commissioner of Consumer Affairs. The Act also creates a specialised Residential Tenancies Tribunal with exclusive jurisdiction to hear and determine any tenancy matters.

The South Australian legislation applies to all residential tenancy agreements entered into, renewed, assigned or transferred after December 1, 1978.

Victoria

The Residential Tenancies Act, 1980 codified and redefined the rights and obligations of landlord and tenant, and like the South Australian legislation established specialist machinery to investigate and adjudicate disputes. The Act makes extensive provisions on termination, and landlords recovery of possession, regulates rent increases, excessive rent and bond money, and prescribes a standard form of tenancy agreement containing a new set of rights and obligations.

The Act applies to all oral and written residential tenancy agreements (express or implied) entered into on or after 9th of November, 1981, including Housing Commission and other Crown tenancies. Since introduction there have been 2 amendments: the Residential Tenancies (Amendment) Act, 1982 which phased out pre-existing protected tenancies and the *Residential Tenancies Act (Amendment) Act, 1987* which widened the definition of urgent repairs, and increased the powers and widened jurisdiction of the tribunal.

Two other pieces of legislation in Victoria, are of relevance in the residential tenancies area:

(i) *Caravan Parks and Movable Dwellings Act, 1988* came into force in February 1989. In brief it aims to extend rights under the *Residential Tenancies Act* to caravan park dwellers. When the Act was first introduced, there was substantial debate over the definition of: "Caravan park dweller", and the original bill was amended to provide coverage only if the length of residency exceeded ninety days. A number of matters were also excluded from the Act including provisions for urgent repairs and no protection was given against huge seasonal fluctuations in rent.

(ii) *Rooming House Bill, 1989.* This Bill was tabled in Parliament in 1989 to provide some protection to residents in rooming houses. There is currently community debate as to certain eviction provisions which can be carried out without reference to the tribunal.

New South Wales

The Residential Tenancies Act of New South Wales, 1987 and the *Residential Tenancies (Amendment) Act, 1989*, define the rights and obligations of landlords and tenants in New South Wales. The Act came into effect on 30 October, 1989. The Act binds the Crown (with the exception of Housing Department tenancies) and also is the only Act in Australia to specifically include movable dwellings (S.7). The legislation requires tenancy agreements to be in standard form (S.9), but permits parties to agree on further terms provided they are not inconsistent with the Act (S.10). The Act specifically introduces the contractual rules in relation to breach of contract (S.15).

Repair provisions are included in the Act, which permit the tenant to undertake urgent repairs and obtain reimbursement from the landlord (S.28). A general obligation is imposed on the landlord to provide and maintain the premises in a reasonable state of repair (S.25). Rent provisions restrict the amount of advance rental to two weeks for most tenancies (S.38), and require the keeping of rent records and the provision of receipts (S.39 and 40). There is provision for a tenant to apply for an order that a rent increase is excessive (S.47), and the legislation details matters to be taken into account by the tribunal in determining rent applications. Provisions in relation to termination of agreements, set out specified notice periods for specific grounds (see part 5), but the right to evict without any ground is retained subject to 60 days notice (S.58). Part 6 of the Act establishes a Residential Tenancies Tribunal, to hear and determine tenancy disputes, sets out the jurisdiction and functions of the tribunal, and detail matters in relation to hearings.

The legislation does not deal with security deposits, as a scheme was established under the *Landlord and Tenant (Rental Bonds Act) 1977.* Under this scheme it is mandatory for all bonds to be deposited with the Rental Bonds Board within seven days of receipt. Bonds are restricted to four weeks in respect of unfurnished premises and six weeks in respect of furnished premises. The legislation establishes a Rental Bond Investment Account for funding of housing projects and tenancy advice services.

Western Australia

The *Residential Tenancies Act (1987)* redefines and codifies the rights and obligations of landlord and tenant. Like the South Australian legislation it vests advisory, investigatory, conciliatory, research and educational functions with the Commissioner of Consumer Affairs. It does not however establish a Residential Tenancies Tribunal to resolve disputes, but appoints a number of referees under Section 5 of the *Small Claims Tribunal Act, 1974*, to hear and determining tenancy

disputes. The Act binds the Crown (including the housing authority but with the exception of bond and rent increase provisions).

The Act establishes a Rental Accommodation Fund kept at the Treasury. Landlords or agents receiving bonds are required to lodge the amount either with the Bond Administrator (Permanent Head of the Crown Law Department) or with an authorised agent. Interest at a prescribed rate (now 6%) is payable to the Rental Accommodation Fund, and the remainder is paid to Consolidated Revenue. No interest is payable to the tenant.

Under the Western Australian legislation, letting fees are still possible and owners and tenants can contract out of, or significantly modify some 14 aspects of the agreement (including repairs, rights of entry, payment of taxed and rates, and discrimination provisions). The Act is open for review in two years.

Queensland

The *Residential Tenancies Act 1975* applies to all residential tenanted premises excluding those let for holiday purposes. Apart from fixed term tenancies, a landlord may increase rent subject to a month minimum notice period. There is an implied covenant in every tenancy agreement that the landlord will provide and maintain the premises in good repair. A *Rental Bond Act* was introduced earlier this year to establish a Rental Bond Authority. All bonds must be lodged with the Authority by the landlord or agent within 14 days (S.21), although the Minister has discretion to extend time for particular cases or classes (S.20). The Authority is entitled to all the interest. Provision is made for the Authority to loan monies to the tenant to cover a bond, where it is satisfied the tenant would financially be unable to provide it. Such loans are subject to repayment as the Authority deems fit, and may include interest free loans. There is an automatic pay out at the end of the tenancy when both parties

are in agreement as to the disbursement. However where there is a dispute necessitating adjudication, the matter has to be referred to a Small Claims Tribunal, constituted under the *Small Claims Tribunal Act, 1973-87.* The Tribunal has no discretion to withhold possession in the case of hardship. The 1989 legislation also prohibits certain payments, such as multiple bonds, and requires full receipts to be provided, full rent and bonds. Contracting out is prohibited.

In respect of eviction, there is little legislative protection given to tenants. A tenant in breach of any implied or specified covenant, can be evicted subject to 14 days notice. In respect of ongoing periodic tenancies, a landlord must give one months notice to terminate the tenancy. Due to the limited security of tenure, other covenants, such as that imposed by the landlord to repair and maintain the dwelling, are of little value.

Australian Capital Territory

The *Landlord and Tenant Ordinance 1949* applies to all residential tenancies in the ACT, with the exception of government tenancies. A range of public housing decisions are currently however appealable to the Administrative Appeals Tribunal, including eligibility and transfer decisions, but excluding evictions. This is of significance in the ACT because of the high proportion of government tenancies. The Ordinance protects the tenants tenure by prescribing some 15 contingencies in respect of which a tenancy may be terminated, notwithstanding any terms of the agreement, such as a provision that the tenancy will terminate on a specific date, or upon specified notice by the landlord. The 15 prescribed grounds in Section 63 fall into 2 broad categories:

(i) Namely, the tenants breach of obligation.

(ii) The landlords (or successor's) reasonable requirement of the premises for personal use (ie sale, conversion, demolition etc.).

In the case of an unexpired fixed term tenancy, the landlord may rely on a prescribed ground for termination, only if the tenancy agreement specifies the ground as one for termination. The prescribed period of notice depends on the length of occupation, ranging from 7 to 30 days, unless the lease specifies a longer period.

The Ordinance also regulates rent increases (S.62), although since 1981 there has been no regulation of rent levels. Under the Ordinance the landlord is required to ensure the dwelling house is in fair and tenantable repair at the commencement of the tenancy. Although there are no provisions under the Ordinance to deal with ongoing maintenance or repair requirements. The Ordinance abolished the common law remedy of distress, and also specifically prohibited certain payments such as key money, and other payments in exchange for the grant, assignment, transfer or renewal of a lease. It is an offence to refuse to let a dwelling house on the grounds that children should live in it, and in any prosecution arising under the section, the onus is on the defendant to prove that the ground of refusal was not that alleged in the charge. It is further, an offence under the Ordinance, to enquire of any prospective tenant whether it is intended that any children should live in the dwelling house.

The situation in 1989, is that there has now been a new ACT government for 6 months, and interest groups are currently lobbying for the establishment of a Rental Bonds Board.

Northern Territory

Rent controls were introduced in Northern Territory following Cyclone Tracey. The *Tenancy Act 1979* sets up a comprehensive system governing fair rents, provides a methodology for determining "fair rents", and prohibits the letting of premises at an excessive rent. Determinations may remain in force for 6 months. The legislation

implies a covenant into every lease that the landlord should maintain the premises in good and tenantable repair. The maximum amount of bond money is 4 weeks rental, and forfeiture of bond money is restricted to tenant damage, unreasonably dirty premises and unpaid rent. It is an offence under the Northern Territory legislation to discriminate against children, or on the basis of membership of a tenant association. The legislation prescribes grounds for eviction (principally, failure to pay rent, breach of the lease, or requirement for the landlords personal use) and prescribes minimum periods of notice for determination.

The Act also establishes a Tenancy Tribunal to settle disputes arising under the Act.

Tasmania

As the common law and statute has been discussed at some length in Chapter 3, this section provides a brief summary of the current position. The law in Tasmania is basically nineteenth and early twentieth century landlord and tenant law reflecting the "laissez faire" philosophy of minimal restrictions on freedom of contract. The *Landlord and Tenant Act 1935* applies to all private residential leases. Apart from the *Substandard Housing Control Act 1973-5* there are no legislative controls on rent or rent increases. No obligation is placed on the landlord to repair and maintain the premises in good and tenantable condition. There is an implied covenant in every lease registered under the *Lands Titles Act* that the tenant will keep and yield up the premises in good and tenantable repair, damage by reasonable wear and tear excerpted.

There is no restriction on the amount of bond money, no restrictions on its use and no clarification as to the status of bond money and who is entitled to interest accruing during the tenancy. A Small Claims Division (of the Court of Requests) was established in 1984 and has jurisdiction to deal with bond disputes. Matters up to

$1,500.00 can be resolved in the Division. There is minimal security of tenure (apart from fixed term agreements) and tenants can be evicted at short periods of notice (a week or fortnight) regardless of the length of occupancy. There is no anti-discrimination law. The ancient remedy of distress for unpaid rent is still lawful in Tasmania, and all the common law remedies for recovery of possession are still available.

6.2 Application

General

- In general legislation in Vic, S.A., and W.A. applies to any residential tenancy agreement entered into, renewed, extended, or assigned or otherwise transferred after the respective commencement dates in each jurisdiction. Specific transitional provisions governing existing tenancy agreement and periodic tenancies, are included in each Act. In W.A. and S.A. the Act applies to fixed term tenancy agreements from the first day after commencement on which rent is payable under the agreement. In Vic, where an existing fixed term agreement is renewed, on or after commencement of the Act, the tenancy agreement is deemed to have been entered into, on the date on which the term was extended. Section 7(2) of the W.A. Act and Section 7a of the S.A. Act contain further identical provision, in relation to proceedings in respect of a residential tenancy agreement, commenced prior to introduction of the new legislation. The Vic legislation also phases out pre-existing rent controls of the *Landlord and Tenant Act 1958*.

- The legislation in each state indicates basic agreement as to the definition of "residential tenancy agreement". The definition contained under Section 5 of the S.A. Act and Section 3 of the W.A. Act is as follows:

"'Residential tenancy agreement' means any agreement, whether express or implied, under which any person for valuable consideration, grants to any other person, a right to occupy, whether exclusively or otherwise any residential premises for the purposes of residences."

A residential tenancy agreement is defined by Section 3 of the N.S.W. legislation as:

"any agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence:

(a) Whether or not the right is a right to exclusive occupation.

(b) Whether the agreement is express or implied.

(c) Whether the agreement is oral or in writing, or partly oral and partly in writing, and includes such an agreement granting the right to occupy residential premises together with the letting of goods."

Prima facie these definitions would appear to be much broader than the traditional common law definitions.

- Each jurisdiction provides for a number of specific exclusions, which vary from statute to statute.

Contracts for Sale in Respect of Premises

The W.A., Vic, S.A., and N.S.W. Acts exclude application of the Act to residential tenancy agreements where:

(a) The tenant is a party to an agreement for sale and purchase of the premises.

(b) Where the agreement arises under a mortgage in respect of the premises.

Company Schemes

In S.A., W.A. and N.S.W. agreements are exempted which arise under a scheme under which:

(1) a group of adjacent premises is owned by a company, and
(2) the premises comprised in the group are let by the company to persons who jointly have a controlling interest in the company.

Boarders and Lodgers

The S.A., W.A. and N.S.W. Acts specifically exclude agreements where the tenant is a boarder or lodger. The Vic legislation is silent on this issue, and in some certain instances caravan park residents, boarders and lodgers have been successful in bringing a matter before the tribunal, where they are able to demonstrate an exclusive right to the premises, as required under the definition of residential tenancies agreement contained in the Vic Act. Victoria now has separate legislation extending limited rights to Caravan Park occupiers and movable dwelling tenants, and separate legislation for rooming house occupants.

Holiday Premises

The Victorian legislation exempts agreement in respect of rented premises ordinarily used for holiday purposes. Under the W.A. legislation and 1981 amendment to the S.A. Act, the exemption is wider in scope covering all agreements "bona fide" entered into for the purposes of conferring on a person, a right to occupy premises for a holiday. An agreement offering a right to occupy premises for a fixed term of

three months in W.A., (two months in N.S.W. and S.A.) is, in the absence of proof to the contrary, deemed not to have been entered into "bona fide" for the purposes of conferring a right to occupy the premises for a holiday.

Landlords Principal Residence

Only the Victorian legislation exempts fixed term tenancy agreements where:

(i) The rented premises were, immediately before the agreement was entered into, the landlord's principal place of residence.
(ii) The term is less than sixty days and,
(iii) That the agreement confirms this, and contains a statement that the landlord intends to resume occupancy of the premises at the end of the tenancy agreement.

Institutional Accommodation

In Vic, S.A. and W.A. and N.S.W. legislation excludes premises situated in the following institutions:

(i) Hostels.
(ii) Educational institutions (including colleges).
(iii) Hospitals.
(iv) Nursing homes.
(v) Rehabilitation homes (Victoria).
(vi) Aged homes.
(vii) Homes for disabled persons.

Hotels and Motels

All legislation exempts premises situated in a hotel or motel.

Clubs

In S.A., W.A. and N.S.W. any premises used for the purposes of a club are exempt.

Mixed Residential/Commercial Premises

The Victorian legislation also exempts agreements in respect of premises, which form part of a building in which other premises are let to the tenant for purposes of a trade, profession or business carried out by the tenant.

Employment

The tenancy contracts created or arising under terms of a contract of employment, or entered into in relation to such a contract, are exempt under the Victorian legislation.

Farms

Exempt premises in Victoria include rented premises which form part of premises let to the tenant and which ordinarily are used as grazing area, farm, orchard, market garden, dairy farm, poultry farm, pig or bee farm.

Agreements Over Five Years

Only the Victorian legislation exempts specific fixed term tenancies on the basis of the length of the agreement. In Victoria fixed term tenancies, exceeding five years which cannot be determined prior to time (except for breach), are also exempt.

Application of the Act to Mobile Dwellings

N.S.W. is the only state to have made specific reference to movable dwellings. The *Residential Tenancy Act* applies to movable dwellings and sites to an extent specified by regulation.

Prescribed Agreements

Vic, S.A., and W.A. legislation also exempt tenancy agreements where the agreement is prescribed, or is an agreement of prescribed class.

Prescribed Premises

Vic, S.A. and W.A. legislation also exempt any prescribed premises or premises included in a class of prescribed premises.

Modification by Regulation

Both S.A. and W.A. provide for modification of the application of the Act by regulation, so as to exclude or modify specific residential tenancy agreement or class of agreement, or any premises or classes of premises. The S.A. legislation also empowers the Tribunal to exempt a tenancy agreement or premises from the Act, although the number of exemptions granted is small.

The Victorian legislation also empowers the Tribunal on application of the landlord or tenant to modify application of the Act on the basis of hardship. An order made by the Tribunal may operate for an express period stated in the order, and may be made subject to such condition as the Tribunal thinks fit.

The Position of the Crown

The position in relation to Crown tenancies differs between the states.

The S.A. legislation (following amendment in 1981) binds the Crown, with the exception of S.A. Housing Trust and Electricity Trust tenancies. In 1986 a further amendment provided coverage for existing periodic tenancies of the Crown.

In Vic. Section 10 of the *Residential Tenancies Act* bind the Crown, including the Ministry of Housing.

The W.A. legislation (S.4) bind the Crown. However, the Governor may, by regulation exclude or apply, in modified form, provisions of the Act, to any prescribed premises or agency, being a person or agency that is acting on behalf of the Crown. Homeswest (the W.A. Housing Authority) has been exempted from provisions in relation to bonds and rent increases.

The relevant section of the N.S.W. legislation (S.4) bind the N.S.W. Crown except for the N.S.W. Land and Housing Corporation which are exempt from certain provisions. Section 4 also binds the Crown "not only in the right of N.S.W. but also so far as the legislative power of Parliament permits, the Crown in all its other capacities".

Presumably, the intent of the section is to address the issue of Commonwealth department tenancies (such as the Department of Defence). The present law is that state law will not bind the Crown in the right of the Commonwealth, unless it states so, or makes it clear by application that the Crown in right of the Commonwealth is to be bound. Even if such an intention is expressed, whether the section will in effect bind the Commonwealth, depends on whether the State has the necessary legislative

power to do so. The authorities on Commonwealth State immunities are conflicting on this point. The Vic., S.A. and W.A. legislation does not purport to bind the Crown in the right of the Commonwealth, and therefore Crown tenancies created by Commonwealth instrumentalities are exempt in these states.

Assessment

The arguments in favour of binding the Crown have been well stated by the Report of the Community Committee in Victoria, (and have been addressed by the Cabramatta Tenancy Working Party in N.S.W., and the Law Reform Commission Report in Tasmania):

(i) Housing Commission tenants in general have the same problems and relationships to their landlords as tenants in a private rental sector and therefore should have the same rights and duties.

(ii) The view that Commission tenants should have fewer rights than the tenants in the private sector because they pay lower rent, and will lead to the creation of "second class citizens and second class justice" for them.

(iii) The State should set an example as a landlord, and support new model laws rather than seek to avoid their application.

(iv) If, as the Housing Commission claims in its report to the Law Reform Commission (1978), it treats its tenants well and does not act arbitrarily, it has nothing to fear from the new legislation. The use of leases with onerous terms cannot be justified by the Commission if it rarely invokes them.

The S.A. Housing Trust and the Tasmanian Department of Housing and Construction, have argued for an exemption from application of residential tenancies legislation for similar reasons:

(i) The organisation operates as a welfare housing operation.

(ii) It charges rents usually below market levels.

(iii) It assists tenants in financial difficulties.

(iv) In practice it provides security of tenure beyond that afforded by the Act.

(v) It maintains its premises through a comprehensive maintenance program.

(vi) It does not require a security deposit in the accepted sense.

These arguments are relevant in assessing the position of Housing Department tenancies, but are not relevant in respect of other Crown tenancies.

Housing Tasmania is by far the largest single landlord and in the last consensus year (1986), there were 12,213 housing authority tenancies. The arguments advocated by Law Reform Commission Report and the Community Committee in Victoria, concerning "second class justice" and the governments "leadership role" are persuasive from a social justice perspective. However, there are significant additional issues relevant to Housing Tasmania tenancies, which might be more appropriately addressed as a part of a system of comprehensive reform for the public rental sector. These issues which need addressing include: access to public housing (shortfall in availability causing long waiting lists), decisions regarding transfers and financial eligibility rules (including rebate formulas).

An examination of the current residential tenancy agreement form, in use by the Department (effectively creating tenancies determinable at one weeks notice), suggests the need for new legislation including a fair statutory standard form lease. As far as is practicable the lease should include all the rights and obligations imposed on parties by any new residential tenancies legislation. Due to the different categories of accommodation, it may be necessary to develop separate agreements for flats, separate houses, elderly residents units, etc. The second major reform recommended is the establishment of a Housing Commission Appeals Board or Tribunal with

jurisdiction to deal with all matters of vital concern to tenants. The system established should provide for an external administrative review of decisions.

In summary although functions of a new Residential Tenancies Tribunal could conceivably deal with all these issues, it would seem preferable to establish a body that would specialise in Housing Tasmania tenancies. An additional advantage of this approach is that it would significantly reduce the number of cases likely to be lodged with the proposed Tribunal, and thus speed up the process of quickly dealing with disputes in the private rental sector (many of which are likely to involve bond returns and evictions).

6.3 Establishment of Residential Tenancies Tribunals

6.3.0 Introduction

The most significant aspect of the Acts in Vic., S.A. and N.S.W. is the establishment of Residential Tenancies Tribunals, which have the power to hear and determine all matters arising under the Acts. In August, 1989 the Minister of Consumer Affairs in Victoria released a major report on the functions and services of the Residential Tenancies Tribunal. This report makes a number of recommendations in relation to the general tenancy responsibilities of the Ministry, the Residential Tenancies Fund, and the quality of justice and other related matters. The outcome of this research will be of considerable value in considering legislative, policy and administrative aspects in the establishment of a Residential Tenancies Tribunal in this state.

This section considers a number of aspects of the operation of tribunals including financial limits, powers, personnel and general resourcing issues.

6.3.1 Financial Limits on Jurisdiction of Tribunals

Monetary Limits on Jurisdiction

State	Dispute Forum	Monetary Limit	Extension of Limit
S.A.	Residential Tenancies Tribunal	$2,500; S.21(2) R.T.A.	On consent of parties
Vic.	Residential Tenancies Tribunal	$3,000; S.18(1) R.T.A.	to $5,000 on consent of parties
W.A.	Referee - Small Disputes Division	$3,000; S.12(4) & (7)	on consent of parties in writing
N.S.W.	Residential Tenancies Tribunal	$5,000; S.85(3)	-

In Victoria, the Tribunal cannot hear or determine an application involving a monetary dispute exceeding $3,000.00 unless both parties give written consent to the Registrar. The monetary limit on jurisdiction can be extended to $5,000.00 subject to such consent. In W.A. a referee (appointed under S.5 of the *Small Claims Tribunal Act, 1974*) has jurisdiction to hear and determine any monetary claim up to a prescribed amount of $3,000.00, which like the Victorian legislation can be extended subject to written consent. In S.A. the upper monetary limit is $2,500.00, but it can be extended on consent by the parties.

In Qld and N.S.W. separate legislation exists for the purpose of regulating the security deposit system. (*Landlord and Tenant (Rental Bonds) Act, 1977 (N.S.W.); Rental Bond Act, 1989 (Qld)*). Under the Qld legislation, disputes in respect of security deposits are referred and dealt with under the *Small Claims Tribunal Act, 1973-87*, where the monetary limit is $1,500.00. Section 83(3) of the *Residential*

Tenancies Act, 1989 (N.S.W.) transferred the forum for the resolution of bond disputes from the *Consumer Claims Tribunal Act, 1974 (N.S.W.)* to the new Residential Tenancies Tribunal.

In considering the monetary limit on jurisdiction, it is necessary to have regard to the objective of insuring that virtually all tenancy disputes are dealt with by the Tribunal. It is important that there is flexibility to amend the upper limit by prescription, as the need arises. It is recommended that there should be scope to exceed the jurisdictional limits subject to consent by both parties in writing.

6.3.2 Tribunal Members: Selection

Selection criteria for tribunal members differ between the states. In Victoria, eligibility for selection is confined to barristers and solicitors of the Supreme Court or Magistrates. The maximum term of office is 7 years. (S. 14).

Under the S.A. legislation (S.14(3)) any person may be appointed as a member of the tribunal, although eligibility for the position of Registrar is restricted to legal practitioners. Both the Registrar or Deputy Registrar of the Tribunal may (subject to direction of the Tribunal) exercise jurisdiction of the Tribunal in respect of matters a prescribed class (S.17).

Under Section 80 of the N.S.W. legislation, the office of Chairperson is restricted to a person qualified to be a Magistrate; full time members are restricted to barristers and solicitors, but there are no legal requirements for the appointment of part time members.

In W.A., referees are appointed under the *Small Claims Tribunal Act, 1974*, and eligibility is confined to legal practitioners, who are less than 65 years of age (S.7).

Qualification of Tribunal Members: Legal or Non-Legal?

In S.A., tribunal members in most instances hear cases alone. 4 out of the current 17 members do not have legal qualifications. Evidence provided to the Victorian Ministry of Consumer Affairs by the Chairperson of the S.A. Residential Tenancies Tribunal suggests that the appointment of lay members has worked well. 80% of applications are investigated before going to hearing, which enables matters likely to raise legal complexities to be allocated to legally qualified members. The routine requirement for written reasons in all cases permit the Chairperson (a legal practitioner) to monitor all decisions for consistency.

In Victoria, eligibility for appointment as a tribunal member is restricted to barristers and solicitors. Many of the submissions received by the Residential Tenancies Review Steering Committee expressed concern over the lack of informality (and in some instances intimidating manner) of the referee. The issue of informality is important, because the rules of natural justice require that each party has sufficient opportunity to present their evidence and arguments to the Residential Tenancies Tribunal. If this opportunity cannot be used, because one party feels ill at ease and intimidated by the environment or proceedings, it will be difficult to meet the conditions necessary for a fair hearing to occur. The emphasis in a hearing should be to remove legalistic and overformalised procedures which impact on the ability of the parties "to conduct their case in person".

1. It is submitted that selection criteria should include the following:

   (i) A proven or perceived capacity to promote the informal and equitable resolution of disputes.

   (ii) An ability to encourage awareness, involvement and confidence in the proceedings.

(iii) An ability to comprehend legislation.

(iv) A breadth of experience.

(v) A knowledge of community and housing issues.

(vi) A capacity to adjudicate, as well as negotiate.

(vii) An awareness of the problems of specific tenant groups (such as migrant groups).

2. It is recommended that the S.A. approach is to be preferred, and that members be drawn from the those that have relevant and appropriate experience and expertise. No recommendations are made as to the balance between legal and non-legal members, other than to suggest that not less than 25% of tribunal members should be appropriately qualified lay members. The Tribunal is essentially an administrative rather than a judicial forum, and the appointment of lay members would bring a broader experience in residential tenancies into the Tribunal. It is important that the tribunal include members who are:

(i) Sensitive to the broader context in which tenancy disputes occur.

(ii) Aware of the difficulties faced by minority groups likely to be significantly represented in the tenant population.

(iii) Knowledgeable about state and community support services.

(iv) Highly skilled in inter-personal communication and in *non-adversarial* conflict and resolution skills.

(v) Cognizant of the psychological impact of legal and court processes on individuals.

(vi) Able to ensure that legal language and processes are readily understandable and intelligible to all parties.

(vii) Demonstrate practical and relevant experience in housing, social and community services.

(viii) Reflect a diversity of social and ethnic backgrounds.

Part and Full Time Members

Tribunals in S.A., N.S.W. and Vic operate with a majority of part time members. This option allows members to remain involved with the community and broaden their perspectives on housing and social issues. The desirable option would appear to be a mix of full and part time members. It is recommended that position statements for full time members include evaluation and research functions, in addition to duties associated with the hearings.

Training of Residential Tenancies Tribunal Members

Considerable difference exist between the states in their approach to induction and training of tribunal members. In S.A. tribunal members have a brief inductive period, during which they sit on tribunal hearings, although no specific induction program has been developed. There is, however, close collaboration between the Chairperson and new tribunal members. Under the Victorian model, all new appointments are filled on a part time basis, and full time members are appointed only from the ranks of experienced part time members. New members undergo an 8 day training period, which involves in part sitting in on hearings. Generally new members initially begin observing techniques of conciliation and adjudication in a Small Claims Tribunal (where considerable negotiation skills are required) before moving on to hear residential tenancy cases. Initially new members are observed by experienced referees, and at all time are encouraged to discuss specific cases or procedural or legal issues with experienced members. It was the opinion of the 1989 Victorian Review that the training in Victoria, while appropriate was incomplete, and could in part explain the "inconsistency" in approach taken by different tribunal members. The Review recommended the incorporation of a Housing Issues and Awareness Program into the training of newly appointed members, to ensure that members are aware of the broader context in which tenancy disputes arise, and in

general, of the practical operation of the private rental sector. A program of field visits to tenancy advice services, real estate agents and other housing services was recommended by the Victorian Report.

Therefore, it is recommended that consideration be given to the design of an appropriate induction program for new members. In the initial stages of establishing a Tribunal in Tasmania, it is recommended that consideration be given to secondment of a senior member from South Australia or Victoria.

Two other matters in relation to training should be considered:

(i) Ongoing Training of Tribunal Members

As well as initial induction programs it is important to recognise the need for resources to be allocated to provide for continuing training and education of tribunal members. Providing resources for training enables an opportunity for members to consider and evaluate their performance, to expand their relevant knowledge base, and to develop relevant job and related technical skills.

(ii) Training of Support Staff

It is also of importance that counter and information staff are selected on the basis of their ability to communicate effectively with people. Counter staff should be sensitive to the needs of a varying tenant population, and have the capacity to provide adequate and reliable information about the Act and its procedures. This kind of investment in staff development would yield cost effective gains for the Residential Tenancies Tribunal. Greater emphasis could be placed on investigating and resolving complaints prior to the hearing

as is done in S.A., where around 55% of applications are resolved in this way. This permits the Residential Tenancies Tribunal to resolve matters within a relatively short period of time.

6.3.3 Legal Representation

The major feature of procedures before the Residential Tenancies Tribunals in N.S.W., Vic., and S.A. is the restriction of legal representation.

Section 44(1) of the Victorian *Residential Tenancies Act* states that:

(i) "A party to proceedings before the Tribunal shall conduct his case in person". The section then prescribes limited circumstances for representation by a legal practitioner, an agent or an officer of a company. In addition, a qualified legal practitioner may represent a party, (a) where both parties agree, (b) one party has legal qualifications or is a body corporate, (c) the landlord is seeking an order for possession under Section 130 or 131, or (d) where the tribunal is satisfied that the party ought to be represented by a duly qualified legal practitioner.

(ii) The S.A. *Residential Tenancies Act* (S.25) is more widely drafted:

> "A party to any proceedings before the Tribunal shall present his own case and not be represented nor assisted in the presentation of his case by another person."

As in Victoria, the exceptions are the same, except that the in case of agreement by the parties, the Tribunal must be satisfied that the party not legally represented is not unfairly disadvantaged (S.25(2)(a)). The Tribunals discretion to allow legal representation is also restricted to situations in which it is satisfied that one of the parties is unable to appear personally.

(iii) Under Section 94 of the N.S.W. *Residential Tenancies Act* similar restrictions are placed on representation in line with S.A. Section 91 states "Each party to proceedings before the Tribunal shall have the carriage of the party's own case". A party is not entitled to be represented by any other person unless it is approved by the Tribunal, or the other party is represented by the Commissioner for Consumer Affairs or by a barrister, solicitor or agent for the Commissioner. The Tribunal's discretion to approve any representation by another person is restricted to situations of necessity, or unfair disadvantage. Section 95 also allows a tenant to be represented by the Commissioner for Consumer Affairs, or by a barrister, solicitor or agent for the Commissioner. While the N.S.W. legislation does not permit legal representation in situations where the other party has relevant legal qualifications, it is submitted that Section 94(3) is probably wide enough to include representation, but is subject to the discretion of the Tribunal.

Assessment

No reliable data can be ascertained from Tribunal records about the frequency by the legal or non-legal representation. In a survey of 44 contested hearings, the Tenants Union of Victoria (Wilson 1987), found that landlords were represented at 80% of hearings and tenants at only 25% of hearings. Legal representation is permitted as a matter of right in respect of orders for possession (S.44(2)(c)), and as 80% of applications concern order for possession, this would appear to allow representation as a matter of right in the majority of cases.

It is submitted that the use of legal practitioners should be restricted as far as is practicable, while recognising the rules of natural justice may require legal representation in specific circumstances.

The arguments advanced by the Residential Tenancy Steering Committee Report (Vic) for restricting legal representation are:

(i) The appearance of lawyers, will induce the Residential Tenancies Tribunals towards over formal and legalistic proceedings and style.

(ii) The role of the Tribunal in encouraging settlement and making a decision may be hampered by the presentation of legal argument.

(iii) The arbitrating and conciliation role expected of the Tribunal is incompatible with the manner in which lawyers are trained to present evidence, submit legal argument and cross examine witnesses before a Judge, who, in a conventional court, remains essentially passive except when required to rule a legal or procedural principle.

Research studies conducted by David de Vaus involving the survey of parties who have had matters dealt with by the Small Claims Tribunals in Victoria found that only 2.4% of clients felt their chances had been adversely effected by the absence of a lawyer. 75% felt the restriction on lawyers was appropriate and only 14% opposed the restriction.

In considering the issue of legal and other representation in relation to any proposed Tasmanian legislation, it is submitted that representation should be restricted to instances of necessity and unfair disadvantage. It is not considered appropriate to permit legal representation on the basis of agreement, as in Victoria, as one party may feel pressure in a "quasi-legal" setting to consent to the representation. In addition, it is submitted that a person should only have a right to be represented in situations in which the other party has legal qualifications or is a corporation. The purpose here is to prevent less informed and articulate parties from suffering a disadvantage because of the legal and business acumen of the other party.

6.3.4 Tribunal Accessibility

In the light of the Victorian Review of residential tenancies, some consideration needs to be given to administrative, educational and other advice and support functions of the proposed tribunal. In the 1987-88 financial year, 24,137 claims were lodged with the Tribunal in Victoria. Of these, a high proportion of application (some 35.4%) were withdrawn, a further 47.2% resulted in an Residential Tenancies Tribunal order, and the remaining 17.4% were adjourned or dismissed. The Victorian study did not establish the reason for such a high withdrawal rate, but proposed that there should be further investigation. The high percentage of adjourned and dismissed matters also indicates a need to:

(i) Ensure that any proposed dispute resolution process is able to identify and resolve disputes that need not go to the Residential Tenancies Tribunal.

(ii) Ensure that all parties are adequately informed of what information, receipts etc they need to provide, so that the proceedings can go ahead at the scheduled time.

One of the disturbing findings of the Victorian Report was that 84% of applications are made by landlords and only 26% of tenants turn up to the hearings. No comprehensive inquiry to date has been made explaining the reasons for non attendance but persons and groups consulted during the research project identified a number of contributing factors:

- Inaccessibility and public transport problems.
- Problems with time off work.
- Problems with child care.
- Trepidation over the proposal of appearing before a Court.

A number of recommendations for dealing with these problems are presented in the Victorian Report. Consideration should be given to these findings and recommendations in any proposal to establish a Residential Tenancies Tribunal in this State.

6.4 Security Deposits (Bonds)

The taking of security deposits in Australia is of recent origin, and developed as a common practice during the 1960's. It quickly developed into one of the major areas of contention in the landlord tenant relationship, and is one of the most frequent causes of tenant dissatisfaction. Studies cited in Chapter 3.2 indicate that prior to legislative reforms in other jurisdictions, many instances of unjustified retention of security deposits by landlords at the expiration of their tenancy were common.

Legislation introduced into Australian states has sought to regulate the amount, use and depositing of bonds, eliminating some of the major problems with the pre-existing unregulated practices. The legislation does not address the issue of discrimination in housing access caused by the generally large amount of bond payment required in respect of most premises. Only the Victorian legislation (S.70(2)) provides opportunity (in law), for the tenant to take out a tenancy insurance policy, in lieu of a security deposit. The problems of allowing two schemes to run concurrently are discussed in Chapter 3.2.

The following notes provide a brief guide to legislation governing the payment of and holding of security deposits in Australian states.

South Australia: *Residential Tenancies Act 1978-81* (Part IV)

The *Residential Tenancies Act, (S.A.)* was introduced in 1978. Section 31 of the

Act governs the payment of bonds. Section 32(1) limits the amount chargeable to 4 weeks rental (in respect of premises where the rent does not exceed the prescribed amount), and provides a penalty of $200.00 for breach of the provision. Section 32(2) provides that the landlord or agent who receives the security deposit shall provide proper receipts, and pay the money received into the Residential Tenancies Tribunal within a specified period. A private landlord has 7 days, and a licenced real estate agent, 28 days in which to lodge the security deposit with the Tribunal. The section specifies a penalty of $500.00 in respect of a breach of this provision. Section 33 governs the procedure for refund of security deposits following termination of a tenancy. It provides for relatively quick dispersion of monies in accordance with the direction of the parties provided there is agreement. In the absence of agreement either party may apply to the Tribunal for a decision as to whether the whole amount of bond should be returned to the tenant or whether deductions ought to be made for a breach of the agreement by the tenant. The money during this period is placed in a special Residential Tenancies Fund and interest accrued is used to compensate landlords for any damages caused to the premises.

As at 30th June, 1989, the total amount of bonds held by the Tribunal in S.A. was $42,686.00. There were 31,253.00 bonds lodged during the year, and 29,697.00 refunded. Of these 87.6% were paid out by consent of both parties and the remainder by order of the Tribunal. The Tribunal was able to streamline the procedures for refund by use of a "ten day" letter system. Under this system, where a party to a tenancy agreement applies for a refund of bond, notice is given to the other party giving him or her, 10 days in which to indicate whether the application is disputed. If no reply is received the bond is paid out in accordance with the application. If the other party indicates the application is disputed, it is set down for hearing. The system was used in the 1989-9 financial year and out of 2,907 letters sent out only 104 applications (3.6%) were disputed and referred to the Tribunal for determination.

The exemption relating to Residential Tenancies Tribunal bond lodgement for tenants outside the Metropolitan Planning Development Area was removed in 10 Oct. 1988.

New South Wales

The situation in N.S.W. is expressly provided for in the *Landlord and Tenant (Rental Bonds Act) 1977.* Like the S.A. legislation:-

(i) It is mandatory for all bond money to be deposited with the Rental Bonds Board within 7 days of receipt. Section 8(3)-(6) of the Act contains provisions relating to the deposit of rental bonds.

(ii) The amount payable as a security bond is restricted to a maximum of 4 weeks in respect of unfurnished premises and 6 weeks in respect of furnished premises.

Section 10 of the N.S.W. Act specifies that the Rental Bonds Board (established under Part II of the Act) shall be entitled to all the interest, although from January 1, 1990 the Board will commence paying interest to tenants.

Section 11 enables the Board to pay out rental bonds on application made by the lessor or leasee, jointly or separately. Where there is joint agreement between the parties of the tenancy, or where one party directs the Board to pay out the Rental Bond to the other, the Board is able to pay out the monies to either party as directed. The situation is more complex however where one party applies to the Board for payment out of the Rental Bond to himself. In this situation the Board must give the other party notice in writing of the application. If the party to whom the notice is given does not inform the Board that he has commenced proceedings disputing the claim in the Residential Tenancies Tribunal, within 10 days of service of the notice the Board will pay out the rent bond in accordance with the application.

The N.S.W. legislation contains a number of provisions regulating investment and use of bond monies received by the Board. Section 18 of the Act requires the Board to maintain two separate accounts: firstly, a Rental Bond Account into which bonds are placed and withdrawn and secondly, a Rental Bond Investment Account which contains interest received on monies invested. This account is used to pay the costs of administration of the Act, 50% of the operating costs of the Residential Tenancies Tribunal, and any other authorised payments. (The remaining 50% of the operating costs of the R.T.T. is met by the Council of Auctioneers and Agents). Section 21 of the Act allows monies from this account to be used to establish and administer Rental Advisory Services, and Section 22 empowers the Board to borrow by way of bank overdraft, and to obtain advances from the treasurer.

At the 30th June, 1989 314,339 bonds were lodged with the Rental Bond Board (at a value of $169,764,582.00). The mean value of bonds lodged was $648.00 per bond.

For the 88-89 financial year the Rental Bond Board generated a record operating surplus of $24.2 million dollars. (The operating surplus was $17.9 million for the previous financial year). As at the 30th June, 1989 the total assets of the Board stood at $272.2 million. Interest generated for the rental bond account was $18.1 million and at the 30th June, 1989 interest account $94.47 million. During the last financial year the Board directed $44.3 million into state housing programs ($19.3 million to rental accommodation and $25 million to home ownership). Rental accommodation programs included the N.S.W. Rental Property Trust, other joint venture agreements and grants to local councils and community organisations for special housing programs.

In all its operations the Board's objective is the efficient handling of bond money, which includes achieving the greatest financial benefit from both the secure investment of funds. Compared with Victoria which has an interest return of

approximately 10.5%, the efficient investment procedure and the large and unified capital base in N.S.W., have allowed maximisation of money market rates, at around 17.0%

Victoria

The *Residential Tenancies Act (1980)* introduced a number of changes to the existing practice in relation to bonds in Victoria. Under Section 70(2) of the Act, the tenant is given a choice of paying for a Tenancy Insurance Policy. In reality however, the choice is restricted by the failure of the State Government Insurance Office to underwrite a policy. The policies which existed until 1982 had high premiums and provided only limited risk cover, and both appear to have been drafted by the same underwriter. A landlord who refuses to let his property to a prospective tenant because the tenant indicates his preference for an insurance policy, commits an offence under the Act (penalty $500.00). There are however, a number of predictable exceptions which restrict the tenant's right of choice. There is no onus on the landlord to inform the tenant of his right to choose, nor in fact to offer a choice where the weekly rental exceeds $200.00, or where the rented property is the landlord's own home, and he/she intends to resume occupancy on determination of the tenancy.

As in other states, the legislation (S.70(1)) fixes the amount payable to one month's rent and imposes a statutory penalty of $500.00 for demanding or receiving any money above the maximum amount. The Act provides for 2 exceptions, namely there is no limit where the rental exceeds $200.00 per week, or where the landlord obtains permission of the Director or Tribunal to charge a higher bond. (S.71(1)).

The Vic. legislation also introduced a number of modifications in relation to the handling of bond monies. Section 67 requires all money to be deposited in a financial institution approved by the government. It requires the landlord to establish

a trust account at an approved institution within 3 days of receipt. These approved institutions pay interest on bond money into the Residential Tenancies Fund. The Act contains a number of sections detailing provisions to be applied in the event of property transfer, and governing situations in which a landlord may withdraw money from the account. These situations are:

(1) To return money to the tenant.

(2) If the tenant has accepted that the landlord is entitled to it.

(3) Where the rent was in arrears at the termination of the tenancy.

A landlord is entitled to claim money in basically five circumstances - damage by the tenant, lost property, unclean premises, if the property is abandoned by the tenant, and where there are unpaid bills for which he is liable if the tenant defaults. When the landlord has a claim on the bond money he must follow set procedures of notification, and apply to the Tribunal for a hearing enclosing the condition report. Condition reports are mandatory under Section 73 of the Act, but only where a security deposit has been charged. One of the self help measures adopted by tenants against defaulting landlords has been to withhold bond money by using it up as rent before leaving the premises. The Victorian legislation (S.79) makes this practice illegal.

Western Australia *Residential Tenancies Act (1987)* Part IV, Division 1

Although Section 27 of the W.A. legislation limits the consideration for a tenancy agreement to rent and a security deposit, it is still possible for real estate agents to charge letting fees under Section 27(2)(c). Section 29 prohibits a person from taking more than one security deposit, and generally restricts the amount that may be required to 4 weeks rent. The section does not apply in respect of the landlords principal residence, or where the weekly rate of rental exceeds a prescribed amount.

The W.A. legislation is the only Residential Tenancies Act to introduce an additional "pet bond" of $50.00. Failure to comply with this section attracts a penalty of $400.00.

A person receiving a security deposit is required to lodge it in accordance with the provisions contained in the first schedule. The bond must be lodged directly with the Bond Administrator (Permanent Head of the Crown Law Department) or with an authorised agent (who is a public officer appointed by the Bond Administrator to be his agent), within 14 days (if a landlord) and within 28 days (if a real estate agent). All security deposits received are then paid into the Rental Accommodation Fund, and all income (including interest accrued from the investment), is payable into the fund. Interest from bond money is used to fund operational costs for the Bond Administrator, authorised agents and referees. The State Treasurer has control over surplus income available from the fund and may direct that it be used for the purposes of public housing "in such a manner as he may specify". (Schedule I, Part A,5). Under the W.A. model disputes are dealt with by referees appointed under the *Small Claims Tribunal Act.* Schedule I contains details as to the handling and return of security deposits.

Queensland *Rental Bond Act 1989*

The 1989 Act establishes a Rental Bond Authority as a separate corporate body consisting of 3 members. (S.7). Section 41 establishes 2 primary accounts: a Rental Bond Account and a Rental Bond Interest Account. Operating costs in relation to the Act, and its administration are paid from the interest on tenants bond money. Section 44(2) also enables a landlord to apply for compensation for damage caused by tenants, and Section 44(3) enables grants to be made for:

(i) Establishing rental advisory services.

(ii) Other residential accommodation schemes.

(iii) Research matters related to the landlord tenant relationship.

All such grants or loans are subject to ministerial approval.

The legislation prohibits multiple bonds (S.33), requires receipts to be issued (S.34) and imposes mandatory condition reports to be signed by both parties at the commencement and conclusion of the tenancy (S.36). In the event of a dispute between the parties, the authority may pay out the undisputed portion (S.22(2)), but payment of the balance is subject to an order made by the Small Claims Tribunal.

6.5 Repairs and Maintenance

Covenant for Habitability

Under the S.A. *Residential Tenancies Act* a landlord is required to ensure that the premises are let in a reasonable state of cleanliness and are maintained in a reasonable state of repair having regard to their age, character and prospective life. (S.46(1)(b)). Similar provisions are contained in Section 25 of the N.S.W. Act and Section 42 of the W.A. legislation. In S.A. this duty applies in respect of all premises within the scope of the *Residential Tenancies Act*, except substandard premises which are subject to a notice under Part VII of the *Housing Improvement Act 1940-77*, which fixes the maximum rent in respect of the premises.

Under the Vic. *Residential Tenancies Act* the basic duty to repair is imposed on the landlord by Section 97, which provided that a landlord under a tenancy agreement shall ensure that the rented premises are maintained in good repair. Like the S.A. *Residential Tenancies Act* the Vic. legislation also attempts to preclude tenants from

exercising rights under different enactments concurrently. Section 98(1) prescribes that where residential premises are subject to a declaration arising under Section 68 of the *Housing Act, 1983*, the landlord is in breach of Section 97. However Section 98(2) excludes entitlement to any remedies provided by Section 99 (urgent repairs), Section 100 (general repairs), and Section 105 (application for compensation). According to Bradbrook, the drafting of Section 98(1) and (2) is problematic, due to an ambiguity which would appear to allow a restrictive and absurd interpretation by which Section 98 could be taken to exhaustively define circumstances of lack of good repair. The intention of the legislature however appears to have been to simplify the problems of proof for the tenant, by avoiding the need for a tenant to prove existence of a breach of Section 97. Such breach would be automatic if the rented premises were subject to a declaration made by the Housing Commission under Section 56 of the *Housing Act 1958*.

In introducing new Tasmanian Legislation consideration needs to be given to the relationship between the *Substandard Housing Control Act 1973-5* and any proposed new residential tenancy legislation. As in the S.A. *Residential Tenancies Act* (S.46(3)) and the *Victorian Residential Tenancies Act* (S.98), it would seem appropriate to include a similar provision, excluding application of any proposed Residential Tenancies Act to dwellings where a notice is in force under Section 9 of the *Substandard Housing Control Act 1973-5 (Tas)*, establishing a maximum rental in respect of the premises. This would avoid unnecessary duplication of investigative work, remedies and enforcement procedures available under separate enactments. Where the issue of substandard housing is raised, the tenant would therefore choose between complaining to the Substandard Housing Control Section of Housing Tasmania, or complaining under the *Residential Tenancies Act* to the nominated department. (For example the Residential Tenancies Branch of Consumer Affairs Department). Particular attention needs to be paid to the drafting of this section to avoid the problems of the Victorian *Residential Tenancies Act*.

South Australia

If the landlord breaches his duty to repair under Section 46(1)(b), a tenant may apply to the Tribunal to:

(1) Exercise its general powers conferred under Section 22(1) to make an order for repairs against the landlord. Failure to comply with a repair order made by the Tribunal, incurs a penalty not exceeding $1,000.00 (S.22(3)).

(2) For an order for the payment of compensation (S.22(1)(c)) for loss or injury (excluding personal injury) caused by any breach of the agreement. If a landlord fails to comply with an order for compensation, the Registrar or Deputy Registrar can register a certificate of the order at the local court. The certificate has the same force and effect as if it were a judgement order of the local court.

In order to ensure that the landlord complies with the order for repairs or the payment of compensation, the Tribunal may authorise payment of the rent out of the agreement into the Tribunal (into a rent special account), pending performance or determination of compensation. The Tribunal may order that this rent be paid out towards the cost of remedying the breach towards the amount of compensation. Section 22(1)(d) gives the Tribunal a discretion by using the word "may". Therefore a failure by the landlord to comply with an order for repairs, or for the payment of compensation, does not necessarily guarantee that the Tribunal will authorise the withholding of rent. The circumstances in which the Tribunal will exercise its discretion to refuse the remedy is not specified in the legislation. No maximum limit is imposed in Section 22(1)(d) on the amount of rent which may be paid into the Tribunal, nor are there any maximum time limits imposed on the operation of the order. A landlord becomes

entitled to the rent once the repairs have been effected or the application for compensation determined.

A further remedy is available to the tenant under Section 46(1)(c) where a tenant can prove:

(1) That the landlord has failed to comply with the duty of repair under Section 46(1)(b).

(2) That the landlords breach of duty is likely to cause injury to persons or property, or undue inconvenience to the tenant.

(3) That the tenant has made a reasonable attempt to give the landlord notice of the damage.

(4) That the state of disrepair did not occur as a result of a breach of agreement by the tenant.

There is no maximum limit on the amount of compensation a tenant may claim, nor any exclusive list of the type of repair work in respect of which a tenant might invoke the remedy. This is in contrast with the *Victorian Residential Tenancies Act* (S.99(3)) which itemises an exclusive list of "urgent repairs", in respect of which the repair and deduct system operates. The wording of Section 46(1)(b) restricts the availability of the remedy to the potential for personal injury or undue inconvenience, such as disrepair of an essential facility.

The landlord is not obliged to compensate the tenant under the terms of Section 46(1)(c), unless the repairs are carried out by a person with an appropriate licence to do so, and the tenant has furnished a report to the landlord by that person as to the apparent cause of this state of disrepair. The section is aimed to protect the landlord against the possibility of shoddy workmanship. The wording of Section 46(1)(c) makes it possible, for the landlord to endeavour to avoid the operation of the

subsection by challenging whether such notice is reasonable, and therefore creating the possibility that the tenant may not be able to recover his/her repair costs.

The final remedy provided by the S.A. *Residential Tenancies Act,* in relation to repairs, is the tenants right to terminate the agreement by electing termination without specified reasons for notice. (Subject to 21 days notice). This remedy is useful only in respect of periodic tenancies, as it does not apply to fixed term tenancies. Tenants with fixed term agreements may however apply to the Tribunal under Section 76(1) to terminate the agreement on the basis of the landlords breach of the agreement. The breach and the circumstances of the case must be such however as to justify termination of the agreement. The S.A. *Residential Tenancies Act* gives an unfettered discretion to the Tribunal to determine whether the tenancy may be terminated, rather than permit the tenant to give notice at his/her own volition. The choice of the date of possession under Section 76(2), as well as the specific length of notice to which the landlord is entitled are not specified in Section 76. (cf. S.116 *Victorian Residential Tenancies Act*).

Victoria

Unlike S.A. the Victorian legislation distinguishes remedies on the basis of *urgency* of the repairs. Section 99 and 100 of the Victorian *Residential Tenancies Act* contains the basic remedies in respect of a landlords breach of the duty to repair imposed under Section 97 of the Act. Section 99 provides that where a tenant is unable after taking reasonable steps to make arrangements with the landlord to carry out the repairs, the tenant may him or herself carry out the repairs, and the landlord is liable to reimburse the tenant for the reasonable cost of the repairs up to a sum of $500.00. The intention behind Section 99 is to enable the tenant to effect urgent repairs speedily in order that living conditions do not become intolerable. The landlord has 14 days to reimburse the tenant following a notice in writing from the

tenant specifying the urgent repairs that were carried out, and the cost involved. "Urgent repairs" are defined under the Victorian Act as:

(a) A burst water service.

(b) A blocked or broken lavatory system.

(c) A serious roof leak.

(d) A gas leak.

(e) A dangerous electrical fault.

(f) Flooding or serious flood damage.

(g) Serious storm or fire damage.

(h) A failure or breakdown of the gas, electricity or water supply to the rented premises.

(i) A failure or breakdown of any essential service or appliance, provided by the landlord, on the rented premises for hot water, cooking, heating or laundering.

(j) A serious fault in a lift or staircase in the rented premises.

(k) Any fault or damage that makes the rents premises unsafe or insecure.

(l) Any damage for a prescribed class.

Section 99 establishes a qualified repair and deduct system for urgent repairs, and appears to represent a compromise between tenant pressure groups which were seeking a "repair and deduct law" for all repairs, where the landlord was in breach of his obligation, and landlord pressure groups, which considered the remedy to be inappropriate in all cases. The urgent repair provisions under the Victorian Act are problematic for a number of reasons:

(1) There is no clear definition of what amount to reasonable steps to be taken by the tenant before he or she may invoke the remedy.

(2) The remedy is not available to tenants who premises are declared by the Housing Commission under Section 64 of the *Housing Act* to be in a state of disrepair.

(3) Section 99(3)(j) which includes in the definition a serious fault in the lift or staircase in the rented premises, is poorly drafted, because it would appear to restrict the remedy to situations where the lift was actually located in the tenants flat.

(4) Section 99(2) also requires re-drafting due to the ambiguity of whether the day on which the notice is received should be included or excluded.

(5) Loosely worded clauses such as "serious roof leak", "serious fault" and "substantial damage" may be interpreted differently by the parties.

With the exception of "urgent repairs", and premises subject to a declaration under Section 64 of the *Housing Act Victoria (1983).* Section 100 of the *Residential Tenancies Act* outlines the basic procedures and remedies in respect of repair problems. Under Section 100(1), if a landlord has not carried out repairs to the premises within 14 days after being notified by the tenant, of the need for repairs, the tenant may request the Director of Consumer Affairs to investigate the matter, with a view to ascertaining whether the landlord is in breach of the duty to repair under Section 97. On investigation the Director may if he/she is of the opinion the landlord is in breach of the duty, negotiate arrangements for carrying out the repairs. The Director is required to report to the tenant. Under Section 100(3), the tenant may apply to the Tribunal for an order requiring the landlord to carry out specified repairs once the tenant has received the Director's report. Application to the Tribunal is not restricted to a positive finding in favour of the repairs. Under Section 100(4) the Tribunal may make an order for repairs, if it is satisfied the landlord is in breach of his/her duty under Section 97.

Several observations can be made about Section 100:

(1) The remedy is again "discretionary" and, perhaps, should be redrafted to substitute "shall" for "may", thus applying the remedy automatically in cases where there is a breach of the duty to repair.

(2) The same problems as regards the period of 14 days notice in Section 99, occurs in the drafting of Section 100(1). It would be preferable if the provision specifically excluded or included the day on which the notice is received.

(3) The major problem appears to be the time consuming process of Section 100. Under Section 100(1) there is a minimum delay of 2 weeks to allow the landlord time to carry out the repairs, before the tenant can request an investigation. Investigations currently may take up to 3-4 months, and further lengthy delays occur between arranging an inspection, obtaining a report and setting a date for the Tribunal hearing.

New South Wales

As somewhat detailed accounts have been given of the enforcement provisions in S.A. and Victoria, this section will provide a brief overview of the N.S.W. legislation. N.S.W. follows the Victorian model in allowing a tenant to obtain urgent repairs (to a maximum of $800.00) speedily, and prescribes an identical list of repairs which may be defined as "urgent" (S.28). The section however details 5 conditions which must be met before the tenant can obtain a reimbursement. These are:

(1) The repair problem was not caused by a breach of the agreement by the tenant.

(2) That the tenant made a reasonable attempt to give the landlord notice.

(3) If notice was given, the tenant had given the landlord reasonable opportunity to make the repairs.

(4) The repairs were carried out by a licenced and properly qualified person

(5) Written notice was given to the landlord specifying the details of the repairs and the their cost.

In all other instances the tenant must apply for an order to the Residential Tenancies Tribunal.

Western Australia

Section 423 of the *Residential Tenancies Act* details the owner's responsibility in respect of maintaining the premises in a reasonable state of repair. Apart from this section, there are no specific provisions setting up methods of enforcement as in S.A., Victorian and N.S.W. In respect of a breach by the landlord to maintain or repair the premises, a tenant may apply to a referee for an order requiring the landlord to carry out the repairs. (S.15). The referee has a number of powers including the power to require work to be done, (S.15(2)(a)) reimbursement of repair costs (S.15(2)(b) and (c)), and authorise payment of rent into the Registry of the Small Claims Tribunal until compensation has been determined. The W.A. legislation does not provide any mechanisms by which "urgent repairs" made be carried out by the tenant, with any certainty that he/she will be reimbursed.

It should also be noted that under Section 82(3) an owner can contract out of any obligation to repair the premises, provided the residential tenancy agreement is in writing and is signed by the owner and the tenant. This is a major weakness of the W.A. legislation.

Summary

It is important that repair provisions in residential tenancies legislation establish methods of enforcement that are fair and efficient.

There appears to be problems under both the S.A. and Victorian Residential Tenancies Acts in relation to the repair provisions. Under the S.A. model, although the Tribunal may authorise payment of rent to the Tribunal, pending performance or determination of the repair matter, it is not bound to do so. Statistics for the last 3 years indicate, that the provisions are not frequently used. (1985-86, 13 orders; 1986-87, 25 orders; 1987-88, 14 orders). In respect of Section 46 of the S.A. legislation it is submitted that time requirements for reimbursement of tenant repair costs be incorporated.

By contrast the Victorian legislation attempts to separate procedures for "urgent" and "non-urgent" repairs, but the drafting of the list is problematic, and the procedures for obtaining other non-urgent repairs within a reasonable time frame, is extremely limited.

It is recommended that:

(1) That consideration be given to development to a rental housing code, to bring together under one law all existing legislation for minimum standards.

(2) Any proposed legislation include provision for the tenant to make "urgent repairs", subject to qualifications in respect of notice, compliance, cost, workmanship and receipts. It is recommended that further attention be given to the drafting of "urgent repair" categories, to avoid the problem of the Victorian legislation.

(3) Where the landlord fails to comply with the repair notice, legislation should grant the Tribunal powers to order the withholding of rent. The onus should be placed on the landlord to give a reasonable explanation, for his failure to repair. (ie building costs, personal financial hardship etc).

(4) Where the tenant chooses to terminate a tenancy as a result of failure to repair, legislation should either, (1) specify the period of notice which the tenant is required to give, or (2) limit the Tribunal's discretion to determine whether a tenancy may be terminated, by specifying matters to be taken into account in making a decision. (such as the degree of damage, attitude of the owner, reasonableness of the non-compliance, hardship etc).

(5) The legislation should place an onus on the tenant to take care of the premises during the tenancy, and notify the landlord of any damage to the premises. A suitable provision might be drafted along the lines of Section 26(1) of the N.S.W. legislation. Malicious and substantial, intentional damage to the premises by the tenant should be a criminal offence, and entitle the landlord to seek an immediate compensation or a possession order from the Tribunal.

6.6 Security of Tenure

In general legislation in S.A., Victoria, N.S.W. and W.A. establishes new codes, departing almost totally from the common law.

The Residential Tenancies Acts in each state set out substantially new rules as to the grounds on which a tenancy may be terminated, and as to the period of notice required for each ground. These varying periods reflect the differing interests of the party to whom the notice is addressed. When a tenant gives notice to terminate the agreement, a landlord may be required to re-advertise and find new tenants. A Notice of Termination served on the tenant may require the tenant to search for other accommodation. (Often in a tight rental market). The periods of notice in each of the Acts are designed to take into account the likely practical effect of the operation of the provisions.

Fixed Term Tenancies

S.A. has essentially retained the common law position in relation to fixed term tenancies. This means that at the expiration of the term (if the contract does not specify what is to happen), the tenancy terminates, without any additional notice requirements being placed on the parties (S.61(1)(a) and (b)). Once the term expires the agreement terminates only if the tenant delivers up vacant possession. If the tenant remains in possession, then the tenancy becomes a periodic one, and the landlord must apply to the Tribunal for an order to terminate the tenancy (S.73(a)(1)) within 30 days of the expiration of the termination. Failing this, the tenancy can only be terminated under the notice rules specified in the Act.

Section 109 of the Victorian legislation sets out the grounds on which a tenancy may be terminated. There are no special grounds for fixed term tenancies, and in consequence an agreement for a fixed term continues after expiration of the term, and is dealt with under the general provisions for termination.

Section 53 of the N.S.W. Act and Section 60(1) of the W.A. Act follow the S.A. legislation.

Notice Provisions in the Residential Tenancies Acts

The notice provisions in the Acts are detailed and complex in their practical and legal effect. This section sets out in summary form the grounds and periods of notice for termination established under the different Residential Tenancies Acts.

Notice by landlord where:

- *Premises are being sold.*

Under the Victorian, N.S.W. and W.A. legislation, a landlord may give notice to terminate an agreement where he has entered into a contract for the sale of the premises, under which he is required to give vacant possession. The Victorian legislation prescribes a 60 day minimum notice period (S.122(1)(e), the N.S.W. and W.A. legislation prescribes a 30 day minimum notice period (S.56(1) *Residential Tenancies Act N.S.W.)*; S.63(1) *Residential Tenancies Act W.A.*). It is further an offence under the W.A. legislation to falsely state the ground (S.63(3)).

- *Premises required for demolition.*

  The S.A. and Victorian legislation prescribes a minimum notice period of 60 days (S.64(1)(a) and S.122(1)(a) respectively).

- *Premises required for substantial renovations requiring vacation.*

  The S.A. and Victorian legislation prescribe a minimum notice period of 60 days (S.64(1)(b) and S.122(1)(b) respectively).

- *Premises are required for occupation by the landlord or his/her immediate family.*

  The S.A. and Victorian legislation prescribe a minimum notice of 60 days. (S.64(1)(c) and S.122(1)(d) respectively). The Victorian legislation is more broadly defined and includes grounds that the premises are required for another person who normally lives with the landlord or is wholly or substantially dependent upon him. (S.122(i)(d)).

- *Premises are required for occupation for a prescribed purpose.*

  Section 64(1)(d) of the S.A. Act imposes a minimum notice period of 60 days.

- *Premises are required to be used as a business or for other non-residential purposes.*

  Section 122(1)(c) of the Victorian legislation prescribes a minimum notice period of 60 days.

Notice in Respect of Breach of Agreement

Legislation in all states sets out reduced periods of notice in respect of a breach of the tenancy agreement by either party.

Breach by the Landlord

Under the Victorian legislation a tenant may give notice where the landlord is in breach of his/her obligations in respect of quiet enjoyment, or of maintaining the premises. The right is restricted to fixed term tenancies. Under Section 116 the tenant must give the landlord 14 days opportunity to remedy the breach or pay compensation, before serving the termination notice. The period of notice is a further 14 days.

Similar provisions are contained in Section 116(1) of the N.S.W. legislation. There are additional provisions in the N.S.W. legislation for allowing a tenant to give notice where the landlord has breached the same provision on 2 occasions. In such a situation there is no requirement of the tenant to provide opportunity for the breach to be remedied. (S.116(3)).

Under the S.A. and W.A. Acts there are no specific notice provisions as to breach by the owner. However under Section 75(1) of the W.A. legislation, and Section 76(1) of the S.A. legislation, a tenant may apply to the Tribunal to terminate the agreement for breach by the landlord. Where the Tribunal is satisfied that the breach "is in the

circumstances of the case such to justify termination", it may terminate the agreement. The Tribunal has a wide discretion under both Acts to grant or refuse the application.

Breach by the Tenant

In all states the landlord is entitled to recover possession on relatively short notice when the tenant reaches his/her obligations. There are marked differences between the states, in terms of the opportunity provided to the tenant to remedy the breach.

Under the Victorian legislation, no opportunity to remedy the breach is required where:

(1) Rent remains unpaid for 14 days.
(2) Obligations with respect to payment of security deposit or bond insurance are broken.
(3) Where a child has been permitted to reside in the premises in breach of a term of the agreement.
(4) Where the tenant has assigned or sublet without the owners consent.

The minimum period of notice to which the tenant is entitled is 14 days. In all other cases of breach the tenant is entitled to a 14 day period in which to remedy the breach or pay compensation.

Under the S.A. legislation, a termination notice may be given under Section 63, in respect of any breach of agreement by the tenant. The stipulated notice period is 14 days. The only restriction is in respect of rent arrears, and notice cannot be given unless the tenant has remained unpaid for 14 days. (S.63(3)). Some relief is provided by Section 73(3)(b) which provides the tenant with an opportunity to remedy the breach and Section 73(2)(b), which enables the Residential Tenancies

Tribunal to refuse to make a termination order, if the breach is not in the circumstances of the case, such as to justify termination.

The W.A. legislation prescribes a period of not less than 7 days in respect of breach by the tenant. In respect of breaches of the agreement (excluding the rent provisions), the tenant must be provided with an opportunity to remedy the breach. (S.62(3)).

Section 57(1) of the N.S.W. legislation details notice periods in respect of breach of agreement by the tenant. The legislation stipulates a 14 day minimum notice period. If the breach is in respect of a failure to pay rent, the rent must be 14 days in arrears before such a notice can be issued. (S.57(4). As in S.A. the Residential Tenancies Tribunal may refuse to make an order for possession on the ground it is not such as to justify termination. (S.64(2)(b). In addition Section 64(2)(c), specifically states that the Tribunal shall on application by a landlord, make an order for termination, if it is satisfied, inter alia that "the tenant has seriously or persistently breached the residential tenancy agreement". (S.64(1)(b)). This would seem to suggest that the Tribunal is likely to refuse an order for minor breaches of the agreement.

Notice to Vacate Without Specified Grounds

Where no reason is provided by the landlord for termination of the tenancy, the periods of minimum notice stipulated by the Residential Tenancies Acts are as follows:

South Australia	- 120 days (S.65)
Victoria	- 6 months (S.123(1))
New South Wales	- 60 days (S.58(2))
Western Australia	- 28 days (S.68(2))

Where no reason is provided by the tenant for termination of the tenancy the minimum period of notice stipulated are:

South Australia - 21 days (S.70(2))
Victoria - 28 days (S.115(1))
New South Wales - 21 days (S.9(2))
Western Australia - 21 days (S.68(2))

Notice Where Agreement is Frustrated

Where the premises are destroyed or unfit for habitation Section 114 of the Victorian legislation provides that a tenant may give immediate notice. Under Section 7(1) of the S.A. legislation, where the premises become uninhabitable or cease to be lawfully usable as a residence, a tenant is required to give 2 days notice, and the owner is required to give 7 days notice. Similar provisions to the S.A. legislation are contained in Section 69 of the W.A. legislation. Section 61(1) of the N.S.W. allows immediate termination by either party in situations where the premises become wholly or partially inhabitable, or are required by an authority through a compulsory process.

Immediate Notice

Section 118 of the Victorian Act enables the landlord to give immediate notice, where the tenant is causing substantial damage. Under the S.A. Act (S.74), the landlord may make an urgent application to the Tribunal for an order for compensation or possession. Under Section 73(1) of the W.A. Act an application may be made for termination, where the referee is satisfied that the tenant has caused or is likely to intentionally or recklessly damage the premises, or any person on the premises or adjacent property. The order for possession may take immediate effect.

Special Hardship Provisions For the Landlord

Under the S.A. legislation (S.75), a landlord may apply to the Tribunal to terminate an agreement on the basis of hardship. The legislation provides that the Tribunal may terminate the agreement if it is satisfied that the landlord would, in the circumstances suffer undue hardship if he/she was required to terminate the tenancy under any other provision. A similar clause is found in Section 69(1) of the N.S.W. legislation, and Section 74 of the W.A. Act.

In Victoria no specific right is given in relation to terminations, although a landlord or tenant may apply under Section 7(1) to the Tribunal to exclude any provision of the Act causing severe hardship.

6.7 Discrimination

Several states, S.A., Victoria and W.A., have provisions in their Residential Tenancies Acts, which prohibit discrimination against applicants for tenancies on the sole grounds that they have children. State anti-discrimination legislation in S.A., N.S.W. and Victoria also prohibits discrimination in the provision of rental accommodation on a number of grounds including sex and marital status.

A number of forms of discrimination remain legal in all states, including discrimination on the grounds of mental handicap, age, religious or political conviction, homosexuality and receipt of a pension or benefit.

South Australia

Exclusion discrimination is proscribed in S.A. under Section 58 of the *Residential Tenancies Act 1978-81* (S.A.). The prohibition extends to both landlords and agents. A landlord must not instruct his agent to refuse to let premises to an applicant

on the grounds that it is intended that a child should live on the premises. (S.58(2)(a)). In addition it is an offence to advertise an intention to discriminate. (S.58(2)(b)). The legislation prescribes a $200.00 penalty. An attempt was made in the 1978 legislation to prohibit a landlord or agent from enquiring from a prospective tenant, whether it was intended that a child should live in the premises. The section was repealed in 1981, as the working party which reviewed the legislation, found that this prohibition in fact created an obstacle between landlord and tenant in negotiating an agreement.

There are 2 exemptions under the S.A. legislation. The section does not apply in respect of the landlords principal place of residence, or where the landlord lives in adjoining premises. (S.58(5)).

Victoria

Exclusion discrimination is proscribed in Victoria under Section 88 of the *Residential Tenancies Act 1980* and extends to both landlords and agents. Unlike the S.A. and W.A. Acts, there is no express prohibition against advertising an intention to discriminate. A penalty of $200.00 is also prescribed.

There are 3 exceptions set under the Victorian legislation:

(i) Premises which are to be let by a statutory authority or corporate body which receives accommodation for single persons and childless couples accommodation.

(ii) Premises which are the landlords principal residence.

(iii) Premises that are by reason of the design, or location are unsuitable or inappropriate for occupation by a child.

As the third exemption provides a plausibly pretext on which it is possible to avoid application of the section, Section 88(3), of the Victorian legislation, enables a person to make application to the Tribunal for a determination as to the whether the premises should be exempt. It may be preferable for a landlord who seeks an exemption in respect of suitability of his/her premises, for children, to be required to make application to the Tribunal. Transferring the onus to apply for the exemption would reduce reliance on this exception, as a plausible cover for discriminatory behaviour. It is submitted that any exclusion shall be restricted to "safe" rather than "unsuitable" or "inappropriate" premises, as the definition creates problems of interpretation.

Western Australia

Exclusion discrimination in respect of children is proscribed in W.A. under Section 56 of the *Residential Tenancies Act 1987 (W.A.)*. As in Victoria and S.A., the legislation applies to landlords and agents, and prescribes a penalty of $400.00 for breach of the section. It is an offence under Section 56(2)(b) to advertise an intention to discriminate.

Under the Western Australian legislation a landlord is permitted to discriminate against children in respect of his/her principal place of residence, or where the landlord resides in adjoining pemises. (S.56(3))

New South Wales

The *Residential Tenancies Act (1987)* does not contain discrimination provisions. There is separate state anti-discrimination legislation in N.S.W., which covers the area of rental accommodation.

Summary

Legislation in W.A., S.A., and Victoria prohibits discrimination only in respect of access to accommodation and not in respect of continuing occupancy or eviction. Without legislative prohibition, it is possible for a landlord to:

(i) Insert a term in a residential tenancy agreement providing that children must not reside on the premises. Breach of the condition would currently entitle the landlord to terminate the tenancy.

(ii) Subject to stipulated periods of notice in respect of "no reasons evictions," a landlord or agent may evict a tenant who bears a child.

It is submitted that any proposed reforms should deal with the issue of discrimination in respect of continuing occupation and eviction. In Bradbrook's evaluation of the discrimination provisions in the S.A. and Victorian legislation, he suggests that a suitable form of legislative prohibition should:

(i) Prohibit the insertion of any clauses purporting to determine a tenancy on the ground that there are or will be any children residing in the premises.

(ii) Deem void, any such clauses in tenancy agreements.

(iii) Prohibit refusal to renew a tenancy on the grounds that there are or will be any children residing in the rented premises.

(iv) Transfer the burden to the defendant to prove that any refusal to renew was not made on the grounds that there will be or are any children residing in the premises.

In relation to reform of residential tenancies law in Tasmania several other matters need to be considered in relation to the effectiveness of enforcing statutory provisions:

(1) Provisions need to be drafted which enable the tenant to complain to a nominated authority, who has the power to investigate and prosecute. (See S.11(1)(d) *Residential Tenancies Act 1978-81 (S.A.)*).

(2) Consideration needs to given to evidential problems associated with the onus of proof. It is clear that where the onus of proof requires the tenant to prove a mental intention to discriminate on the part of the landlord or agent, (on the balance of probabilities), difficulties will be encountered by the tenant in successfully proving that discrimination has occurred. However, this is a difficult area which raises civil liberty issues and needs to be closely examined.

(3) Powers granted to the Tribunal need to ensure that adequate remedies are provided to a person unlawfully discriminated against. Such powers might include the availability of compensation (for damage to feelings), and an order that the landlord or agent be required to enter into a contract with a tenant, or prospective tenants. Particular attention needs to be paid to the drafting of relief provisions under the Act, to ensure that the Tribunals powers to award compensation and grant restraining orders, can be extended to "prospective tenants". The drafting of these provisions in the Victorian and S.A. legislation is problematic.

(4) The legislation needs to provide a means by which a conciliated settlement can (where possible) be achieved. It is necessary for the conciliator to have the power to call a compulsory conference of the parties. If conciliation is not

successful then the individual needs to be able to initiate an individual action (as a matter of right), before the Tribunal for compensation, and or obtain other appropriate orders. It should be possible for the Director of the nominated department (Consumer Affairs Council) to conduct the action on behalf of the tenant or prospective tenant.

(5) The issue of discrimination during the tenancy and in respect of eviction discrimination has been discussed (albeit briefly), and will need to be considered at some length in any reform proposals.

(6) Finally, in the design of anti-discrimination provisions, it is of crucial importance to consider where the responsibility for initiation of action, and burden of proof should be placed.

6.8 Quiet Enjoyment and the Landlords Right of Entry

Covenant for Quiet Enjoyment

The covenant for quiet enjoyment is expressly introduced in the S.A., Victoria, N.S.W. and W.A. legislation.

Section 92, of the Victorian legislation provides that a landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement. The Act does not define "quiet enjoyment", so it is submitted that a Tribunal would adopt the common law definition. The limitations of the common law definition have been discussed in Chapter 3.4.

In S.A., N.S.W. and W.A., the obligations on the landlord are more comprehensively defined than under the Victorian legislation. Section 44 of the W.A. legislation provides:

"It is a term of every agreement -

(a) that the tenant shall have the quiet enjoyment of the premises without interruption by the owner, or any person claiming by, through or under the owner, or having superior title to that of the owner.

(b) the owner shall not cause or permit any interference with the reasonable peace, comfort or privacy for the tenant in the use by the tenant of the premises, and

(c) that the owner shall take all reasonable steps to enforce the obligations of any other tenant of the owner in occupation of adjacent premises, not to cause or permit any interference with the reasonable peace, comfort or privacy of the tenant, in the use by the tenant of the premises."

It is submitted that Section 44(1)(b) is wide enough to cover situations of indirect interference. (such as disconnecting essential services). In addition Section 44(1)(c) overcomes the common law restriction on the operation of the covenant in respect of third party interference.

The relevant section of the W.A. legislation appears to be modelled on Section 47(1) of the S.A. *Residential Tenancies Act.* An additional subsection under the S.A. legislation, also makes any interference with the tenants reasonable peace, comfort or privacy, in circumstances that might amount to harassment, and offence. The Act prescribes a penalty not exceeding $1,000.00, in addition to any civil liability that might arise.

Section 22(1) of the N.S.W. legislation, do not include any requirement on the landlord, in respect of enforcing the obligations of any other tenant of the owner, as in S.A. and W.A. Section 22(2) of the N.S.W. legislation makes failure to comply with Section 22(1), a contravention of the Act which attracts a fine of 5 penalty units ($500.00) under Section 125(1).

In summary there appear to be problems in introducing the common law covenant without further qualification. It is recommended that any proposed legislation define "quiet enjoyment" so as to remove the common law limitations on operation of the doctrine.

Landlords Right of Entry

The Residential Tenancies Acts in S.A., Victoria, W.A. and N.S.W. contain detailed provisions in respect of the landlords right of entry. Legislation in each state divides the landlords right of entry into 2 separate entries: first, situations where the tenant agrees to the entry, and secondly, situations where there is no such agreement. The Table on the following page sets out the fundamental differences between the states. In examining the Table the following observations can be made:

(i) The S.A. and W.A. legislation appears to permit the landlord a very generous right of entry to inspect the premises, by not stipulating how often such visits may be made. Legislation in the S.A., N.S.W. and W.A. Acts does however provide adequate notice to the tenant that an inspection is to occur. In Victoria, a minimum of only 24 hours notice is required.

(ii) In S.A., N.S.W. and W.A., the restrictions in relation to entry for the purposes of showing prospective tenants, prospective buyer or mortgagees, are not qualified in respect of the periods of notice required, the hours during which a visit may take place, nor the frequency of such visits. It is suggested that while the requirements for reasonable notice may vary, as a general rule a period of 24 hours notice should be given, to satisfy the requirements for reasonable notice.

(iii) It is submitted that consideration be given to prescribing penalties for breaches of the right of entry sections.

PERIOD OF NOTICE AND OTHER QUALIFICATIONS, IN RELATION TO THE LANDLORDS RIGHT OF ENTRY, UNDER THE RESIDENTIAL TENANCIES ACTS

Entry Provisions	Vic(S.95)	S.A.(S.49)	N.S.W.(S.24)	W.A.(S.45)
With the tenants consent:				
Notice	may be immediate	may be immediate	may be immediate	may be immediate
Qualifications	any agreement can-not be made more than 7 days in advance	-	-	-
Without the tenants consent:				
(i) Emergency	-	no notice required	no notice	no notice required
(ii) Prospective tenants				
Notice	24 hours	"reasonable notice"	"reasonable"	"reasonable"
Qualifications	-	within 28 days of termination	within 14 days of termination	within 21 days of termination
Frequency	-	"reasonable"	"reasonable"	"reasonable"
(iii) Prospective Buyers or lenders				
Notice	24 hours	"reasonable"	"reasonable"	"reasonable"
Qualifications	-	"reasonable hours"	-	"reasonable"
Frequency	-	"reasonable"	"reasonable"	"reasonable"
(iv) Valuation Inspections				
Notice	24 hours	-	-	-
(v) Compliance with a legal duty under the Act				
Notice	24 hours	48 hours	2 days	72 hours
Frequency	-	-	-	-
(v) Inspection				
Notice	24 hours	B/n 7 and 14 days	7 days min.	b/n 7 and 14 days
Frequency	not more than twice a year	not stipulated	not more than 4 times a year	not stipulated
(vi) Reasonable grounds for belief of tenant breach				
Notice	24 hours	-	-	-
(vii) Collecting rent				
Notice	-	-	-	-
Frequency	-	not more than once a week	-	not more than once a week
Qualifications	-	inspections allowed every 4 weeks	-	inspections allowed every 4 weeks
(viii) Reasonable belief in abandonment				
Notice	-	-	immediate	-
(iv) In accordance with an order of the Tribunal				
Notice	-	-	as stipulated	-

CHAPTER 7

RECOMMENDATIONS

Chapter 7 sets out in point form the general recommendations relating to reform of residential tenancy law in Tasmania. Explanatory notes are only provided where the main text of this report has not dealt with the substance of the specific recommendation.

7.0 General

It is recommended that:

(i) Reform in relation to residential tenancies is given a high priority on the current government's legislative agenda.

(ii) (a) The government produce a green paper outlining reform options for public comment and debate.

(b) Draft legislation is given adequate time for public consultation and comment.

Notes: While it is important that a high priority is given to introduction of legislation, it is important that the time is taken to produce a creditable piece of legislation that is fair, comprehensive and works effectively, in both a legal and administrative sense. In being the last state to introduce reforms, the Tasmanian legislature has a distinct advantage for several reasons. Firstly, because it may avoid some of the drafting difficulties and defects of earlier Residential Acts. Secondly, because the practice and experience of existing residential tenancy tribunals will be a valuable source of information.

(iii) The Act should at a minimum address the following issues:

- The holding of security deposits, or the establishment of a Rental Insurance Scheme.
- Security of tenure.
- Repairs and maintenance.
- Rent and rent increases.
- Privacy.
- Discrimination.
- Mandatory standard form lease.
- The definition of "tenant".
- The establishment of a dispute resolution forum, which is informal, readily accessible, whose proceedings are simple, and which can make decisions which are final and enforceable.

(iv) The Act and all documents (pamphlets, rights booklets and the standard form lease itself) should be drafted in plain English. Supporting documents should also be available in an appropriate range of community languages.

Notes: If tenants and landlords are to be fully informed of their rights and obligations, it is important that they can read the legislation easily. An excellent report on the techniques of drafting in plain English has been produced by the Law Reform Commission of Victoria. The Commissioner expressed the view that:

> "The language in which laws and legal documents are drafted places serious obstacles in the way of citizens and effectively forces ignorance on them. In a number of ways legal language has become removed from the patterns of language used elsewhere, so that it falls short as an act of communication, leaving some of the parties mystified about its message. It is hardly just or fair if those who are to be regulated by laws cannot comprehend them readily, or cannot understand documents they are expected to sign."

There is good evidence to suggest that poorly worded documents, waste time, create confusion and misunderstandings, induce errors and lead to inefficiencies in administration. In brief, such documents are not cost effective.

The goal in drafting in plain English is to ensure the law is easily available to those who are being regulated by it. The 1985 Victoria Residential Tenancies Bill is written in question and answer form, and it is recommended that the parliamentary drafting office, consider this approach as one possible option. It is further recommended:

(1) That the Tasmanian government implement a plain English policy, in respect of all new legislation.

(2) That the government nominate a responsible agency to organise training programs and develop testing and evaluation procedures.

(3) That the parliamentary drafting office develop guidelines for the writing of legislation in plain English.

(v) That the government establish a comprehensive and intensive campaign to publicise and promote the new laws.

Notes: It is necessary that introduction of legislation is accompanied by a carefully designed promotional and educational campaign, aimed at ensuring that landlords, agents and tenants are aware of the existence of the new Act and Tribunal. The information should be provided in an appropriate range of community language and use a range of media so as to reach as wide an audience as possible.

7.1 Application

It is recommended that:

(i) The Act provide coverage for as many categories of tenants as possible. Specific classes of agreement or premises that will need to be examined are:

- Contracts for sale in respect of premises.
- Company schemes.
- Holiday premises.
- Landlords principal residence.
- Hotels and motels.
- Institutional accommodation (ie hostels, hospitals, aged homes, nursing homes, disabled persons homes, rehabilitation homes).
- Clubs.
- Mixed residential/commercial premises.
- Employment related accommodation.
- Farms.
- Movable dwellings, caravan park residents.
- Boarders, lodgers, rooming house residents.
- Provisions for exemption for prescribed agreements or premises.

(ii) (a) The Act bind the Crown (with the exception of Housing Tasmania tenancies).

(b) The government examine the position of Housing Tasmania tenants, with a view to introducing a new standard form of commission lease, and establishing a new system of external administrative review.

Notes: In relation to recommendation (b), the Commonwealth Department of Community Services and Health, have commissioned private consultants.

(Colin Kent and Associates, Melbourne) to investigate the establishment of appeal mechanisms for state housing authority clients. Under the 1989 Commonwealth State Housing Agreement (CSHA), a decision was reached between the Commonwealth Minister and State Ministers to establish an independent appeal mechanism, for the purpose of enabling state housing authority clients, to appeal against decisions in regard to the state provision of housing assistance, funded under the CSHA. Such mechanisms which were due to be in place by 31 August 1990, have now been established in Tasmania.

(iii) The Department of Justice investigate the position of Commonwealth tenancies, in relation to any new residential tenancies legislation.

7.2 Carriage of the Act

There are several options:

(i) (a) Introduction of legislation establishing a Residential Tenancies Division of the Magistrates Court.

(b) Introduction of legislation extending jurisdiction of the *Magistrates Court (Small Claims Division) Act 1989*, to enable the Magistrate to determine claims arising out of residential tenancy agreements.

W.A. is the only state to have taken this approach in providing a forum for the resolution of tenancy disputes.

(ii) Establishment of Residential Tenancies Commission (R.T.C.), headed by a Commissioner who would be responsible for administering the Act. Under this model the R.T.C. would be an independent statutory authority, reporting

direct to parliament. It would operate as a specialist consumer agency with four distinct functions:

(a) A Residential Tenancies Tribunal for resolving disputes.

(b) An investigation and administration section.

(c) An advice and publicity section.

(d) A bond lodgment and return section.

(iii) Establishment of a Residential Tenancies Tribunal within the ambit of the Ministry of Consumer Affairs. Under this model advisory, investigatory, research and educational functions would vest with the Consumer Affairs Council. It would be necessary under this model, to establish the Tribunal as an independent and autonomous body, whose members are appointed by the Governor in Council. The importance of this arrangement is to protect the Tribunal from interference in the administration of justice, in the hearing and determination of cases which come before it.

It is recommended that options (ii) and (iii) receive further consideration, but that option (i) be discarded for the following reasons. Locating the forum for the resolution of tenancy disputes in the Magistrates Court is more likely to intimidate and disadvantage tenant parties. Appointment of Magistrates to hear and determine disputes is likely to make such hearings formal and legalistic. It is important to have a collaborative working relationship between the Tribunal and investigatory, advice and information services provided by a new Commission, or the Consumer Affairs Council. A close collaboration is important in establishing systems to resolve disputes quickly, and where possible to settle the dispute without the necessity for a hearing.

7.3 Establishment of a Residential Tenancies Tribunal

It is recommended that:

(i) A Residential Tenancies Tribunal be established with exclusive jurisdiction to hear and determine all matters arising under the Act. There should be no access to the Courts except in limited circumstances. (Such as appeals on a question of law).

(ii) The monetary limit on jurisdiction be set a realistic level and be indexed with inflation.

(iii) The Tribunal should take over the functions of the Court of Requests (Small Claims Division) in respect of all tenancy matters.

Appointments

(i) Members of the Tribunal should be appointed from persons with relevant and appropriate experience. The selection criteria should emphasise a proven or perceived capacity to promote the informal and equitable resolution of disputes. Members should not be required to have a legal background.

(ii) Appointment should reflect a balance between:

(1) Full and part time members.

(2) Legally qualified and non legal members.

(iii) The Chairman of the Tribunal should be a legal practitioner with the extensive experience in administrative law.

Training

(i) Training packages should be devised for all staff dealing with the legislation, including appropriate induction training with a focus which includes the social and economic context in which the private rental market operates, as well as a focus on the legislation, policies, practices and procedures of the Residential Tenancies Tribunal.

Hearings

(i) Parties should be required to present their case in person.

(ii) Representation by third parties (including legal practitioners) should be restricted, except at the absolute discretion of the Tribunal. The Tribunal's discretion should be restricted to situations where:

(a) Representation is a matter of necessity.

(b) The party would otherwise be unfairly disadvantaged.

(iii) The Tribunal may be constituted by one member.

(iv) In any hearing the Tribunal should:

(a) Not be bound by the rules of evidence, but may inform itself on any matter in such a manner as thought fit.

(b) Act according to equity, good conscience and the substantial merit of the case, without regard to technicalities or legal form.

(v) Parties should be able to request sufficient reasons in writing within fourteen days of being notified of the decision resulting from the hearing.

(vi) Procedures adopted by the Tribunal and decisions made by individual Tribunal members should be carefully monitored for consistency.

(vii) The Tribunal should be able to sit in any part of the state.

(viii) That attention be given towards promoting accessibility for tenant parties. Particular attention should be paid to the recommendations of the recent Victorian review into residential tenancies conducted by the Ministry of Consumer Affairs, August, 1989.

Powers

(i) The Tribunal should have a wide range of powers and remedies and members should be encouraged to use the full range.

(ii) The Tribunal should have the power to enforce its own penalties.

7.4 Security Deposits

Two options are suggested for consideration.

Option A - Rental Bond Insurance Scheme

(1) Although the Victorian schemes which existed until 1982 are not commended, it is recommended that the government examine the possibility of establishing a Tenancy Security Scheme, to be administered by the State Government Insurance Office.

(2) The purposes of the scheme would be:

(i) To replace bonds or security deposits.

(ii) To give landlords some security against loss caused by tenants. The security should be equivalent in cover to that provided under Option B.

(iii) To reduce the cost of access to rented housing.

(3) Under the scheme, the government would establish a fund called the Tenancy Security Fund.

(4) Prior to taking possession of rented premises, the tenant should be required to pay into the Tenancy Security Fund any contribution that he or she is required to pay by Regulations made under the Residential Tenancies Act.

(5) In order for premiums to be kept low it would be necessary for the scheme to be mandatory for all residential tenancies.

(6) The maximum compensation allowable should be a sum equivalent to three weeks rent under the agreement. This restriction is necessary to keep premiums at an affordable level. If a landlord wishes to have excess cover, then he/she needs to do so under separate policy arrangements.

(7) Legislation should clearly specify the situation in which a landlord or agent is entitled to make a claim against the fund.

(8) An application by the landlord to claim against the Tenancy Security Fund, may only be made when the tenancy agreement has ended and the tenant has left the premises.

(9) Condition reports signed by both parties at the commencement and termination of the tenancy, should be compulsory.

(10) The scheme should not change the rights or duties of the parties. The tenant would still be required to comply with the agreement, and would still be liable to compensate the landlord for breaches of the agreement and any excess damage exceeding the cover provided by the policy. The landlord would be under a legislative duty to minimise any loss resulting from breach of the agreement by the tenant.

(11) In the event of a dispute between the parties, a landlord or a tenant or the T.G.I.O. may apply to the Residential Tenancies Tribunal to determine the matter.

(12) The T.G.I.O. should be able to the Tribunal for an order that a tenant pay back to the Tenancy Security Fund any sum that had to be paid out of it because of a deliberate breach by the tenant (as for example wilful damage).

Option B - Regulated System of Bond Lodgment and Return

(1) The legislation should establish a Rental Bond Board, to provide tenants and landlords with an effective and independent custodial service for rental bonds.

Notes: The purpose of such a central holding authority is to protect tenants from misappropriation of their bonds by landlords, and at the same time cover landlords for loss and damage sustained under a tenancy agreement.

(2) On receipt of the bond, the landlord or agent should be required to provide a full receipt, and lodge the bond with the Board within seven days of receipt.

(3) The Rental Bond Board should maintain two separate accounts:

(i) A Rental Bond Account into which bonds are placed and withdrawn.

(ii) A Rental Bond Investment Account, which contains interest received on bond money.

Notes: From calculations made on the basis of the 1986 census data, using a base line of 23,359 tenancies, the estimated amount of money lodged with the Rental Bond Board would be close to $6,000,000.00 (allowing for a 10% non compliance factor, and an average bond of $300.00 per rented dwelling).

(4) It is recommended that the Rental Bonds Board fund 50% of the operating costs of the Residential Tenancies Tribunal. The remainder of the operating costs should be met by an allocation from Central Revenue. It is recommended that the landlord party lodging a claim with the Tribunal should pay a prescribed lodgment fee, (It is suggested that this might be equivalent to the Small Claims Division lodgment fee) and should be considered as a contribution towards the operating costs of the Residential Tenancies Tribunal.

(5) It is recommended that a proportion of the operating surplus be used to fund:

(a) A Residential Tenancy Grant Scheme for funding of tenants advice services and projects.

(b) Joint venture agreements with Housing Department, Local Councils and community organisations. Joint ventures have been successful in New South Wales, in providing rental accommodation designed to meet the requirements of special needs groups within the community,

such as the elderly, single parents, the disabled and unemployed.

(c) Innovative housing schemes (such as housing co-operatives).

The emphasis in funding should be on providing services to those in the private rental sector.

(6) It is recommended that appointments to any rental bond or board, should appropriately reflect the interests of both landlord and tenant parties.

(7) The maximum amount of security deposit on any premises should not exceed 3 week rent.

(8) It should be unlawful to receive more than 1 security deposit in relation to a dwelling.

(9) Consideration should be given to incorporate in provisions, to enable the tenant to pay the bond by instalments, over the first 4 weeks of the tenancy.

Notes: The purpose of this section would be to reduce problems in housing access, due to a prospective tenant's inability to afford "up front payments".

(10) At the time of entering the tenancy, the tenant should be given 2 copies of an inspection sheet, as specified in the legislation, detailing the condition of the premises. The tenant would be given the opportunity, to enter remarks on both copies, concerning the condition of any items, where in the tenants opinion, it is not as stated as in the document. Subject to their mutual agreement, both the landlord and the tenant would be required to sign both copies, one copy being retained by the landlord and the other by the tenant.

(11) The purposes for which a landlord is entitled to make a claim against the security deposit should be clearly defined in the legislation.

7.5 Repairs and Maintenance

(1) The legislation should impose a statutory duty on the landlord to provide and maintain the rented premises (including facilities and common areas):

(i) In clean and good repair.

(ii) In compliance with all health, housing and safety regulations.

(2) The tenant should be under a duty to:

(i) Keep the premises clean.

(ii) Take proper care of the premises and make sure that other people the tenant allows on the premises do also.

(iii) Repair or compensate the landlord for any damage done to the premises.

(iv) Not to make any alterations without the landlords permission.

(v) On vacating the premises, remove all of his/her goods and leave the premises as nearly as possible in the same condition, apart from fair wear and tear, as when the tenant moved in.

(3) The legislation should prescribed penalties for wilful damage by the tenant.

(4) The tenant should be entitled to make essential or emergency repairs and deduct the reasonable cost from the rent, when he or she is unable to contact the landlord after making reasonable efforts. Urgent "repairs" should be defined in the Act. It is submitted that an appropriate list might include:

(a) A burst of leaking hot water system.

(b) A blocked or broken lavatory system.

(c) A serious roof leak.

(d) A gas leak.

(e) A dangerous electrical fault.

(f) Flooding or serious flood damage.

(g) Serious storm or fire damage.

(h) A failure of breakdown of the gas, electricity or water supply to the premises.

(i) A failure or breakdown of any essential service or appliance to the premises for hot water, cooking, heating or laundry.

(j) A serious fault in a lift or stairwell in the rented premises or common area.

(k) Any fault or damage that make the premises unsafe or insecure.

(l) Any damage specified in regulations under the Act.

(5) The legislation should prescribe an upper limit to protect the landlord ($500.00), and require the tenant to supply full receipts to the landlord. The landlord should pay the costs of repairs within fourteen days. If the landlord fails to pay the amount, the tenant may apply to the Tribunal for an order. It is not recommended that self help measures be employed, such as with holding rent without Tribunal approval. Where a tenant is unable to afford urgent repairs and the landlord refuses to comply, provisions in the Act should enable the tenant to make an urgent application to the Tribunal for a repair order against the landlord.

(6) In respect of non urgent repairs, the tenant should be able to apply to the Tribunal for an order for repairs to be undertaken, where the landlord breaches his duty to repair. Such a system should provide for a speedy

resolution of the dispute, with an emphasis on early investigation and conciliation, rather than lodgment of a formal dispute.

(7) It is submitted that provisions be allowed for rent abatement in situations where the basic services and facilities are in need of repair. Rent abatement guidelines should specify that a reduction in services or condition warrants a reduction in rent, and set out the level of appropriate reduction in percentage terms.

7.6 Security of Tenure

(i) Tenants and fixed term tenancies should be entitled to renew their term, unless they have breached the agreement and the landlord has given a valid notice requiring possession.

(ii) Landlords requiring possession at the end of a fixed term tenancy should be required to give a valid notice, before the expiry of the term, failing which a tenancy for a fixed term should automatically continue as a monthly periodic tenancy.

(iii) Termination of tenancies should only be in the manner provided by the Act, using a simple statutory form which requires reasons for eviction to be stated in full and advise the parties of their rights.

(iv) A landlord should not be able to terminate a tenancy except for a just cause which must be detailed in the notice. If a decision is made to retain eviction for no reason, it is recommended that a prescribed period be no less than one hundred and twenty days (as in the S.A. legislation).

Where there is no fixed term agreement, the permitted period for termination should be:

(a) Prescribed Reasons

Where the landlord legitimately requires the premises for one of the following reasons:

(i) Demolition or substantial repairs requiring vacation.

(ii) Occupancy for self or family.

(iii) Compulsory acquisition.

(iv) Conversion to a non residential use.

(v) Contract for sale requiring vacant possession.

The period of notice should be no less than 90 days.

(b) In respect of fixed term and periodic tenancies, a tenancy may be terminated where there is:

Serious Breach of Agreement by the Tenant:

(i) Where the tenant endangers safety, or causes malicious damage immediate notice may be given.

(ii) Where other serious breaches of the agreement have occurred, the tenant should be given 14 days notice to remedy the breach, failing which the landlord may issue 14 days notice to quit.

(iii) A Tribunal shall not grant an order for possession if the breach has been remedied at the time of the Tribunal hearing unless the breach has occurred on at least 2 other occasions.

(c) Serious Breach of Agreement by the Landlord:

(i) Where the landlord endangers the safety of a tenant, causes serious damages to the rented premises or tenant's property, immediate notice may be given.

(ii) Where other serious breaches of the agreement have occurred, the landlord should be given 14 days notice to remedy the breaches, failing wherein the tenant may give 14 days notice of termination.

(iii) Where the landlord has breached the provisions of the Act on at least 2 occasions, the tenant shall not be required to give the landlord an opportunity to remedy the breach, and may issue a 14 day termination notice.

(v) Premises Damaged or Unusable

Either party should be entitled to terminate the tenancy where the premises are substantially damaged or unusable.

(vi) Mutual Agreement

A tenancy may be terminated at any time by mutual consent.

(vii) Notice by Tenant

A tenant shall be required to give 28 days notice to terminate, where there is no agreement for a fixed term.

(viii) Retaliatory evictions by landlords against tenants who try to enforce their rights should be invalid.

(ix) Hardship Provision

Either party may apply to the Tribunal to reduce a fixed term tenancy on the basis of hardship.

(x) Legislation should abolish the right of "peaceful re-entry" and require the landlord to apply for an order for possession, in situations where there has been a breach of the agreement, or where the tenant fails to vacate on the date specified. It should be an offence for any person to:

(a) Require or force a tenant to move out of rented premises, or try to.

(b) Take or try to take possession of rented premises by entering them peacefully or not.

(xi) The Tribunal should have the discretion to refuse possession orders, for example where either party has remedied the breach, if the breach is trivial, or is unlikely to re-occur.

(xii) The Tribunal should be empowered to postpone the date of recovery of possession. This is particularly important where the tenant falls into arrears for specific unforeseen reasons such as temporary loss of employment, hospitalisation or an administrative error in the payment of a pension or benefit.

(xiii) Provisions should also be made to deal with the issue of abandoned goods.

7.7 Discrimination

(1) It is recommended that the legislation deal with the issue of discrimination in rented accommodation. A suitable section might be drafted in the following way.

(2) It is unlawful for a person, whether as principle or agent to discriminate against another person on any of the prescribed grounds:

(a) By refusing the other person offer of accommodation.

(b) In the terms or condition of which accommodation is offered to the other person.

(c) By deferring the other persons application for accommodation or according to the other person a lower order of preference on any list of applicants for that accommodation.

(d) By restricting the licencees or invitees of the tenant by reference to any of the prescribed grounds.

(3) The prescribed grounds of discrimination shall be:

- Race.
- Colour.
- National or ethnic origin.
- Religion.
- Sex.
- Sexual preference.
- Marital status.
- Pregnancy.
- Children.

- Age.
- Personal handicap.
- Membership of any lawful organisation.
- Receipt of a government pension or benefit.

(4) Discrimination should be defined in broad terms so as to include indirect discrimination. A suitable provision might be:

(i) A landlord or agent discriminates against another person on the prescribed ground if by reason by:

(a) The prescribed condition.
(b) A characteristic that appertains generally to persons of that condition.
(c) A characteristic that is generally imputed to persons of that condition.

The landlord or agent treats the tenant or prospective tenant, less favourably than, in circumstances that are the same or are not materially different, the landlord or agent treats or would treat a person not of that condition:

(ii) A landlord or agent discriminates against a tenant or prospective tenant on the prescribed grounds if the landlord or agent requires the tenant or prospective tenant to comply with the requirement or condition:

(a) Which is substantially higher proportion of persons who are not of the prescribed category comply or are able to comply.

(b) Which is not reasonable having regard to the circumstances of the case.

(c) With which the tenant or prospective tenant is not able to comply.

(5) Where the alleged act of discrimination is done for two or more reasons, that includes the particular reason it does matter that the discriminatory reason is the dominant or substantial one, but simply that it is included amongst the reasons.

(6) The Tribunal should have a wide range of powers including:

(i) The power to grant interim injunctions.

(ii) The power to require parties to enter into an agreement.

The grant of appropriate powers to the Tribunal will be crucial in determining the effectiveness of discrimination provisions.

(7) Consideration to be given to whether it should be an offence to require information on any of the prescribed grounds from prospective tenants.

(8) In any proceedings the onus should be on the person charged to prove that the behaviour complained of was not done for a proscribed discriminatory reason.

(9) The legislation should prohibit acts such as discrimination in advertising in rental accommodation.

(10) No recommendations are made as to discrimination on the basis of having a pet. It is submitted however that tenants should have a right to keep pets, subject to reasonable grounds for refusal by the landlord which must be stipulated. What is reasonable depends on the type of pet, the suitability of the premises, and the likely effects on the premises or on neighbouring occupiers. The landlord or tenant may apply to the Tribunal to resolve any dispute arising from the keeping of the pet, or the refusal to allow it. One option might be to include ownership of a pet as a proscribed ground, but to require an additional (pet bond) as in the W.A. legislation (S.29(1)(b)(ii)).

7.8 Quiet Enjoyment

(1) All agreements should contain an undertaking by the landlord that:

(a) The tenant will have vacant possession on the commencement date.

(b) The premises may be used for residential purposes.

(c) Not to interfere in any way (including interference with services) with the tenants' privacy, comfort, or use of the premises or facilities.

(2) The landlords right to enter premises should be restricted. Except in emergencies, written notice should have to be given stating the reasons necessitating entry. The prescribed reasons should be; necessary repairs, inspection twice annually, and showing the premises to prospective tenants or buyers. The period of notice should be at least twenty four hours before entry.

(3) Provisions of the legislation should clearly prohibit "lockouts". It is recommended that:

(a) A landlord or tenant should not be permitted to change the locks or security devices without obtaining permission from the other party.

(b) A landlord or tenant must not unreasonably refuse a request to change a lock or security device.

(c) A landlord must not enter the premises or allow others to do so, except in accordance with the Act.

7.9 Rent/Rent Increases

(i) It is recommended that a system of rent control be introduced for all cases where accommodation is unfit for human habitation, or below standard.

(ii) Where a tenant wishes to challenge "excessive" rent he or she may make an application to the R.T.T. An inspection should be made by the appropriate investigatory arm of the R.T.T. (possibly the Consumer Affairs Council). If the complaint is justified, then the nominated department would be able to bring the action to reduce the rent.

(iii) The legislation should specify the matters to be taken into account in determining a "fair rent".

(iv) Rent increases should be restricted on the following ways:

(a) Ninety days written notice of any increase should be required.

(b) The number of increases should be limited to once a year, regardless of change of tenant.

(c) No rent increases should be permitted during a tenancy for a fixed term.

(v) It is recommended that legislation spell out what is required by way of a receipt for rent, ie that every receipt must be in writing, signed by the person receiving payment and contain the following details:

(a) Tenants name and address of premises.

(b) Amount paid and the fact it is rent.

(c) Date and receipt of payment.

(d) The rental period for which the payment is due.

Notes: The Tenants Union Advice Service has reported that many disputes of rent arrears arise because receipts are poorly made out. It is difficult to resolve these disputes where the documentation is inadequate.

(vi) It is recommended that the distress remedy be abolished.

7.10 Miscellaneous

(i) Subletting

It is recommended that a tenant may assign or sublet subject to consent of the landlord. Such consent to sublet or assign should not arbitrarily or unreasonably withheld.

(ii) Contractual Doctrines

(a) The Doctrine of Unconscionability

It is recommended that any legislation introduce the doctrine, in line with the S.A. and Vic Acts, namely:

"On application by a tenant under a tenancy contract, the Tribunal may by order declare void or vary a term of the tenancy agreement, if it is satisfied that the term is harsh or unconscionable, or is such that a court of equity would grant relief."

(b) Doctrine of Frustration

It is recommended that the doctrine of frustration be introduced into the legislation, along the line of S.71(1) of the R.T.A. (S.A.).

(c) Mitigation of Damages

It is recommended that legislation stipulate that the Tribunal must take into account "whether or not any action was taken by the applicant to mitigate loss or damage", as one of the relevant considerations to be considered in making an order for compensation.

(d) Inter-dependence of Covenants

It is recommended that the doctrine not be introduced into new residential tenancies legislation. Rather it is recommended that any new legislation statutorily define the circumstances in which the tenant is justified in withholding rent, where the landlord has failed to perform major obligations arising under the actual agreement. It is recommended that S.22(1)(d) of the R.T.A. (S.A.) be followed, which enables the Tribunal to authorise payments of rent into the Tribunal, in certain circumstances, until (1) of the agreement has been performed or (2) the application for compensation has been determined.

(iii) Contracting Out

Legislation should expressly prohibit "contracting out" arrangements, and should ensure that the Act has effect despite any stipulation to the contrary in an agreement.

Consideration should be given to making it an offence, to enter into a contract with the intention of either directly or indirectly, defeating, evading or preventing the operation of the Act.

(iv) Letting Fees

It is recommended that provisions of the new Act prohibit the charging of letting fees or "key money" to the tenant. This could be achieved by clearly prohibiting any additional payments, other than (1) bond, if the tenancy insurance option is not introduced, and, (2) 2 weeks rent in advance.

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RESIDENTIAL TENANCY LAW AND PRACTICE IN TASMANIA

VOLUME 2

(Appendices)

INDEX TO APPENDICES

APPENDIX 1

Contents

TASMANIA 1989

CONFIDENTIAL

TENANCY SURVEY - PRIVATE RESIDENTIAL SECTOR

1. Case number [1]

2. Name of organisation _____ [2]

(where appropriate)

---

3. In which suberb do you live? _____ [3]

[4]

Separate house 1

Flat/home unit 2

Villa 3

Duplex 4

Other (please specify) 5

_____

Please record the type of dwelling you live in by ticking the appropriate box.

4. Are you currently renting from the State Housing Department (Housing Tasmania), your employer or a relative?

[5]

Yes 1

No 2

If yes, please do not continue with the interview

(AREA SURVEYS ONLY.)

SUMMARY OF CALLS

	1	2	3	4
Date				
Time				

5. How long have you been living here? 6

- Less than 1 month — 1
- 1 month to less than 3 months — 2
- 3 months to less than 6 months — 3
- 6 months to less than 1 year — 4
- 1 year to less than 2 years — 5
- 2 years or more — 6
- Don't know — 9

6. From whom do you rent this dwelling? 7

- Real Estate Agent (R.E.A.) — 1
- Owner — 2
- Caretaker (rep. R.E.A.) — 3
- Caretaker (rep. Owner) — 4
- Caretaker (rep. Unknown) — 5
- Other (Please specify) _____ — 6

BONDS

7. Did you pay a bond on this dwelling? 8

- Yes — 1
- No (Go to Q 11) — 2
- Don't know (Go to Q 11) — 9

8. How much did you pay? 9
If don't know, code 999 $ ☐☐☐

9. Do you expect a full refund of your bond when you leave? 10

- Yes (Go to Q11) — 1
- No — 2
- Don't know (Go to Q11) — 9

(Interviewer: If the Respondent replies 'it depends', ask him/her to assume the property is undamaged when he/she leaves

10. For which of these reasons do you expect bond money to be deducted?
(More than 1 box may be ticked)

- Inside cleaning ☐ 11
- Repainting - inside ☐ 12
- - outside ☐ 13
- Outside cleaning or garden ☐ 14
- Rent owing ☐ 15
- Damage to property or fittings ☐ 16
- It is normal practice to have money deducted ☐ 17
- Other (Please specify) _____ ☐ 18

COMMENTS:

LETTING FEES

I Would like to ask you about letting fees. A letting fee is a fee paid to an estate agent when you first move into a dwelling. It is meant to cover the agent's cost in renting a dwelling and is non returnable. It should not be charged by a landlord.

11. Did you pay a letting fee when you moved in here? 19

- Yes — 1
- No (Go to Q 13) — 2
- Don't know (Go to Q 13) — 9

12. How much did you pay? 20
If don't know, code 999 $ ☐☐☐

TENANCY CONTRACTS

I would like to ask you about tenancy contracts. These may be either:-

(1) Leases (Which are a set time, such as 6 months or a year)

(2) May be agreements, which say what you can or can't do, and which cover you from rent day to rent day

13. Did you sign a tenancy contract on this dwelling? 21

Yes 1

No (Go to Q 25) 2

Don't know (Go to Q 25) 9

14. Did you have sufficient opportunity to consider it before signing? 22

Yes 1

No (probe - why was this is?) 2

Not interested in reading contract 3

Don't know 9

15. Was it a lease you signed? 24

Yes 1

No (Go to Q 18) 2

Don't know (Go to Q 18) 9

16. Has your lease expired yet? 25

Yes 1

No 2

Don't know 9

17. For what term is/was your lease originally 24

Under 6 months 1

6 - 12 months 2

Over 12 months 3

Don't know 9

18. Did you find the contract..... 26

Easy to understand 1

Difficult in parts 2

Very difficult to understand 3

Dont know 9

COMMENTS:

19. Did the landlord or agent explain the contract to you? 27

Yes 1

No 2

Inadequate explanation 3

Don't know 9

COMMENTS:

20. Did you try to add or to change your Contract before signing it? 28

Yes 1

No (Go to Q 25) 2

Don't know (Go to Q 25) 9

21. In what way did you try and change your Contract?

22. Were you successful in having these changes accepted? 28

Successful 1

Partly successful 2

Unsuccessful 3

Don't know 9

23. Was the contract you signed a:

30

Real Estate Contract 1

Consumer Affairs Council Lease 2

Tenants Union Lease 3

Other (Please specify) 4

_____

Don't know 9

24. Did you receive a copy of your Contract?

31

Yes 1

No 2

Expecting it 3

Don't know 9

COMMENTS:

25. Were you asked to choose whether to have a tenancy contract or not?

32

Yes 1

No 2

Don't know 9

26. Who do you think benefits from tenancy contracts?

33

Landlord and tenant equally 1

Landlord 2

Tenant 3

Don't Know 9

RENT

Now I have some questions about rent

27. Does your rent become due:

34

Weekly 1

Fortnightly 2

Monthly 3

Other (Specify) 4

_____

Don't know 9

28. How much rent per week do you pay?

35

If don't know, code 999 $ ___

29. Is your rent paid .....

36

By cash 1

By cheque 2

Into savings/cheque account 3

Other (specify) 4

_____

Don't know 9

30. Do you usually receive a full receipt for rent paid (i.e. amount paid and dates)

37

Yes 1

No 2

Don't know 9

COMMENTS:

31. How soon after paying your rent do you receive a receipt?

38

- Immediately 1
- 1 - 2 days 2
- 3 - 7 days 3
- 8 - 14 days 4
- Over 2 weeks 5
- Over a month 6
- Don't know 9

32. Has the rent been increased during the last 12 months?

39

- Yes 1
- No (Go to Q 39) 2
- Don't know (Go to Q 39) 9

33. How much a week has your rent increased in total (during the last 12 months)

40

If don't know, code 999 $ ___

34. How much notice were you given before your last rent increase?

41

- 1 week or less 1
- Over 1 week to 2 weeks 2
- Over 2 weeks to 3 weeks 3
- Over 4 weeks 4
- Don't know 9

35. Were you given reasons for the increase in rent?

42

- Yes 1
- No (Go to Q 37) 2
- Don't know 9

36. What were the reasons?

43

(1)

(2)

(3)

(Do not code)

37. Do you consider your rent increase was fair?

44

- Yes (Go to Q 39) 1
- No 2
- Don't know (Go to Q 39) 9

38. Why do you consider your rent increase was unfair?

45

(1)

(2)

(3)

(Do not code)

OPTIONAL

39. We are interested in knowing what proportion of your weekly household income goes in rent. Could you please tell us approximately what your weekly income is?

46

___

REPAIRS & MAINTENANCE

40. When you moved in did the landlord or agent promise to do any repairs to the premises?

47

- Yes — 1
- No (Go to Q 44) — 2
- No repairs needed — 3
- Don't know — 9

41. What were the repairs?

(i) 48

(ii) 49

(iii) 50

(Do not code)

42. Has it/which of the repairs were completed?
(Please tick box or boxes)

(i) Repair 1 51

(ii) Repair 2 52

(iii) Repair 3 53

(Do not code)

43. How many weeks after moving in did it take to complete the repairs

(1) Repair 1 54

(2) Repair 2 55

(3) Repair 3 56

44. Since you moved in have you asked the landlord to do any other repairs?

57

- Yes — 1
- No (Go to Q 51) — 2
- Don't know (Go to Q 51) — 9

45. What were the repairs

(i) 58

(ii) 59

(iii) 60

(Do not code)

46. Has it/which of them have been completed?
(Please tick box or boxes)

(i) Repair 1 61

(ii) Repair 2 62

(iii) Repair 3 63

47. How long after requesting repairs completed in Q 46) was it/were they completed?

(1) Repair 1 64 Weeks

(2) Repair 2 65 Weeks

(3) Repair 3 66 Weeks

48. How long ago was/were (repairs not completed in Q 46) requested?

(1) Repair 1 67 Weeks

(2) Repair 2 68 Weeks

(3) Repair 3 69 Weeks

49. Did your landlord or agent refuse to do any of these repairs? (Please tick)

(i) ☐ 70

(ii) ☐ 71

(iii) ☐ 72

50. What reasons did your landlord/agent give for refusing to do the repairs?
(More than one box can be ticked)

Tenants responsibility ☐ 73

Too expensive ☐ 74

Dwelling being sold ☐ 75

Dwelling being demolished ☐ 76

No worth spending money on ☐ 77

No reason given ☐ 78

Other (Please specify) ☐ 79

_____

_____

51. Since moving in have you done any repairs at your own expense?

80

Yes 1

No (Go to Q 55) 2

Don't know (Go to Q 55) 9

52. What were those repairs?

(i) ☐ 81

(ii) ☐ 82

(iii) ☐ 83

53. How much in total did you spend on these repairs?

84

$ 1 - 49 1

$ 50 - 99 2

$100 - 199 3

$200 - 500 4

Over $500 5

Don't know 9

54. From this list please select the reasons why this/these repairs were carried out by yourself and not the landlord or agent?

Did not think of asking landlord/agent ☐ 85

Did not ask - felt landlord/agent would refuse ☐ 86

Did not ask - job too small ☐ 87

Asked but Landlord/agent refused ☐ 88

Asked but landlord/agent took too long ☐ 89

Requested by the landlord/agent to undertake repairs ☐ 90

55. Since moving in have you spent your own time doing repairs?

91

Yes 1

No (Go to Q 58) 2

Don't know (Go to Q 58) 3

56. What were these repairs?

(i) ☐ 92

(ii) ☐ 93

(iii) ☐ 94

57. How much time in total did you spend on these repairs

95 ☐☐☐ hours

58. In general are you satisfied with the way your agent or landlord maintains and repairs this dwelling?

96

Yes (Go to Q 60) 1

No 2

Don't know (Go to Q 60) 9

59. What are your reasons for this disatisfaction?

(i)

(ii)

(iii)

60. Did you know you could approach the Housing Department, in order to get your place inspected, if you feel it is sub-standard?

97

Yes 1

No (Go to Q 62) 2

Don't know (Go to Q 62) 9

61. Have you ever approached the Housing Department about a place you felt was below standard?

98

Yes 1

No (Go to Q 62) 2

Don't know (Go to Q 62) 9

61A. What did the Housing Department do about it?

PRIVACY AND QUIET ENJOYMENT

62. Has your agent or landlord or caretaker ever visited this dwelling?

99

Yes 1

No (Go to Q 67) 2

Don't know (Go to Q 67) 9

63. How often in the past 6 months has the landlord, agent or caretaker visited?

100

Daily 1

More than once a week 2

Weekly 3

Fortnightly 4

Monthly 5

Every 2 - 3 months 6

Every 3 - 6 months 7

Don't know 9

64. Has he/she ever visited without giving adequate notice?

101

Yes 1

No 2

Don't know 9

65. Has your agent, landlord or caretaker ever entered this dwelling without permission?

102

Yes 1

No 2

Don't know 9

66. How would you best describe his/her visits?

103

Necessary and no bother 1

Necessary but a bother 2

Unnecessary but no bother 3

Unnecessary and a bother 4

An invasion of my privacy 5

PREVIOUS ACCOMMODATION

Now I have a few questions about previous accommodation. We are interested in privately rented dwellings only. (i.e. dwellings rented from Real Estate Agents, private owners or caretakers.)

67. In the last 5 years have your privately rented any other dwelling in Tasmania, other than this one?

104

Yes 1

No (Go to Q 82) 2

Don't know (Go to Q 82) 9

68. Did you rent it through a real estate agent, owner or in some other way?

105

Real Estate Agent (REA) 1

Owner directly 2

Caretaker (rep. REA) 3

Caretaker (rep. owner) 4

Caretaker (rep. unknown) 5

Other (Please specify) 6

_____

Don't know 9

69. Did you pay a bond?

106

Yes 1

No (Go to Q 75) 2

Don't know (Go to Q 75) 9

70. How much did you pay?

107

If don't know, code 999 $ ☐☐☐

71. When you left was your bond refunded in full?

108

Yes (Go to Q 75) 1

No 2

Not applicable (Go to Q 77) 3

Not yet refunded (Go to Q 77) 4

Don't know 9

72. How much was deducted from the bond?

109

If don't know, code 999 $ ☐☐☐

73. For which of these reasons was bond money deducted?

110

- Inside cleaning 1
- Repainting - inside 2
- - outside 3
- Outside cleaning or gardening 4
- Rent owing 5
- Damage to property or fittings 6
- No reason given 7
- Others (Please specify) _____ 8
- Don't know 9

74. Do you think the deduction was fair?

111

- Yes 1
- No 2
- Don't know 9

COMMENTS:

75. How long after you left the property did you have to wait for return of your bond money?

112

- Less than 1 week 1
- 1 - 2 weeks 2
- 2 - 4 weeks 3
- 1 - 3 months 4
- Over 3 months 5
- Don't know 9

76. Were you paid interest on your bond money?

113

- Yes 1
- No 2
- Don't know 9

EVICTION

77. During the past 5 years, have you ever been asked to leave or been evicted from a place, you were privately renting in Tasmania?

114

- Yes 1
- No (Go to Q 82) 2
- Don't know (Go to Q 82) 9

78. How many times has this occurred in the last 5 years?

115

[ ][ ] times

79. The last time this occurred what was the reason given for asking you to leave? (Comments to cover fairness of eviction)

80. How much notice were you given? (in days please)

116

[ ][ ][ ] days

If less than 24 hours given please indicate the number of hours

117

[ ][ ][ ] hours

81. How often was your rent due?

If don't know, code 999

118 ☐☐☐ days

DISCRIMINATION

82. Have you ever been refused private rental accommodation, which you know was available for renting?

119

Yes 1

No 2

Don't know 9

83. Do you think you were refused accommodation for any of the following reasons?
(More than one box may be ticked)

Race	☐ 120
Income	☐ 121
Age	☐ 122
Sex	☐ 123
Children	☐ 124
Student	☐ 125
Other (specify)	☐ 126
_____	
Don't know	☐ 127

Would you like to make any comments about the reason for refusal?

84. Over the last 5 years, have you had any other problems with privately rented accommodation that has not been mentioned in this questionnaire?

128

Yes (Specify) _____ 1

_____

No 2

Don't know 9

85. During the time you have been renting, has the landlord, agent or caretaker, ever seized any of your possessions for unpaid rent?

129

Yes 1

No (Go to Q 86) 2

Don't know (Go to Q 86) 9

85A. What steps did you take to recover your possessions?

85B. Were you successful?

Appendix 1.

TABLE OF RESULTS

SECTION 1: HOUSEHOLD DATA

Category	Frequency	%
Table 1:1 Household Composition		
Single person	15	25.0
Single person with children	13	21.6
2 persons with children	7	11.
2 persons with no children	10	16.7
Sharehousehold - no children	10	16.7
Sharehousehold with children	3	5.0
Not stated	2	3.3
	60	100.
Table 1:2 Number of People in Household		
1	15	25.0
2	19	31.7
3	11	18.3
4	10	16.7
5	3	5.0
6	0	0.0
over 6	0	0.5
not stated	2	3.3
	60	100.
Table 1:3 Number of Children in Household		
1	13	56.6
2	7	30.4
3	3	13.0
over 4	0	0.0
	23	100.
Table 1:4 (Q.95) What is the highest level of education reached by anyone in the household?		
Didn't complete primary school	1	1.7
Completed primary school	5	8.3
Passed 4th year high school	17	28.3
Passed matriculation	6	10.0
Post secondary education	10	16.7
Degree	14	23.3
Don't know	3	5.0
Not stated	4	6.7
	60	100.
Table 1:5 (Q.96) Which of these categories describes the major sources of income for the household?		
Full time employment	19	31.7
Part time employment	8	13.3
Superannuation	-	0.0
Dept of Social Security pension or benefit	22	36.7
Combined sources	8	13.3
Not stated	3	5.0
	60	100
Table 1:6 (Q.92) In what country were you/or head of the household born?		
Australia	36	60.0
U.K.	8	13.3
Asia	2	3.3
Other	7	11.7
Not stated	7	11.7
	60	100

SECTION 2: TENANCY DATA

Table 2:1 (Q 2) Table of Participating Organisations

Steppping Stones Street Walk
Housing Assistance Service
Anglicare
Oasis (Handicapped person support)
Caroline House
Annie Kenney (Young Women's Refuge)
Hobart Womens Shelter
Migrant Resource Centre
Migrant & Refugee Services (Centrecare)
Northern Community Legal Centre (L'ton)
Housing Outreach Service (L'ton)
Bond Rental and Assistance Service (L'ton)
Northern Youth Shelter (L'ton)
Crisis Accomodation Support Assistance

Table 2:2 (Q.3) In which suburb do you live?	Frequency	%
Central Hobart	11	18 3
North Hobart & New Town	14	23 3
South Hobart & Sandy Bay	5	8.3
West Hobart & Mount Stuart	10	16.7
Eastern Shore	3	5.0
Northern Suburbs	7	11 7
Southern Country (002)	3	5.0
Launceston	4	6 7
Not stated	3	5 0
	60	100

Table 2.3 (Q.4) Type of Dwelling		
Seperate house	22	36 7
Flat/Home unit	31	51.7
Villa	0	0 0
Duplex	4	6.7
Other	3	5 0
	60	100.

Table 2.4 (Q 5) How long have you been living here?		
Less than 1 month	17	28.3
1 month to less than 3 months	19	31 7
3 months to less than 6 months	8	13 3
6 months to less than 1 year	8	13 3
1 year to less than 2 years	3	5.0
2 years or more	3	5.0
Don't know	2	3.3
	60	100

Table 2.5 (Q.6) From whom do you rent this dwelling?		
Real Estate Agent	20	33 3
Owner	33	55.0
Caretaker (rep. R.E.A)	2	3 3
Caretaker (rep. Owner)	4	6.7
Caretaker (rep. unknown)	-	0.0
Other	1	1 7
	60	100

SECTION 3: BONDS

Table 3.1 (Q.7) Did you pay a bond on this dwelling?		
Yes	50	83 3
No	10	16 7
Don't know	-	0 0
	60	100.

Table 3.2 (Q 8) How much did you pay?

No bond paid	10	16 7
Less than $100	2	3.3
$100 - $199	8	13 3
$200 - $299	12	20.0
$300 - $399	16	26 7
$400 - $499	6	10 0
$500 + over	4	6 7
Not stated	2	3.3
	60	100

Table 3.3 (Q.9) Do you expect a full refund of your bond when you leave?

Yes	38	76 0
No	8	16 0
Don't know	4	8 0
	60	100.

Table 3.4 (Q 10) For which of these reasons do you expect bond money to be deducted?

Inside cleaning	4
Repainting - inside	1
- outside	2
Outside cleaning or gardening	-
Rent owing	3
Damage to property or fittings	4
It is normal practice to have money deducted	4
Other	3

SECTION 4: LETTING FEES

Table 4 1 (Q.11) Did you pay a letting fee when you moved in here?

Yes	12	20 0
No	44	73.3
Don't know	4	6 7
	60	100.

Table 4.2 (Q 12) How much did you pay?

$1 - $49	3
$50 - $99	3
$100 - $149	0
$150 - $200	1
Don't know	5

SECTION 5: TENANCY AGREEMENTS

Table 5.1 (Q.13) Did you sign a tenancy contract on this dwelling?

Yes	31	51 7
No	25	41 7
Don't know	4	6 6
	60	100

Table 5 2 (Q 14) Did you have sufficient opportunity to consider it before signing?

Yes	21	67.7
No	6	19 4
Not interested in reading contract	0	0.0
Don't know	4	12 9
	60	100.

Table 5 3 (Q 15) Was it a lease you signed?

Yes	29	93.5
No	2	6 5
Don't know	0	0.0
	31	100

Table 5.4 (Q.16) Has your lease expired yet?

Yes	8	25 8
No	21	67.7
Don't know	2	6 5
	31	100.

Table 5 4 (Q 17) For what term is/was your lease originally?

Under 6 months	5	17 2
6 - 12 months	21	72.4
Over 12 months	2	6.9
Don't know	1	3 5
	29	100.

Table 5 5 (Q 18) Did you find the contract . .

Easy to understand	18	58.1
Difficult in parts	8	25 8
Very difficult to understand	1	3.2
Don't know	4	12.9
	31	100.

Table 5 6 (Q 19) Did the landlord or agent explain the contract to you?

Yes	10	32.3
No	19	61 3
Inadequate Explanation	1	3.2
Don't know	1	3 2
	31	100.

Table 5 7 (Q.20) Did you try to add or change your contract before signing it?

Yes	10	32.3
No	21	67 7
Don't know	0	0.0
	31	100

Table 5 8 (Q.21) In what way did you try and change your contract?

Tenant responses:

- "pre-existing property damage"
- "to allow us to deduct money for repairs"
- "to install my own furniture"
- "to have a more restricted right of entry by the landlord"

Table 5.9 (Q.22) Were you successful in having these changes accepted?

Successful	4	40 0
Partly successful	4	40.0
Unsuccessful	1	10 0
Don't know	1	10.0
	10	100

Table 5.10 (Q.23) Was the contract you signed a:

Real Estate Contract	13	41 9
Consumer Affairs Council Lease	0	0.0
Tenants Union Lease	0	0.0
Other	1	3.2
Don't know	5	16 1
Not stated	12	38.8
	31	100

Table 5.11 (Q.24) Did you receive a copy of your contract?

Yes	16	51 6
No	6	19.4
Expecting it	0	0.0
Don't know	0	0.0
Not stated	9	29.0
	31	100.

Table 5.12 (Q 25) Were you asked to choose whether to have a tenancy contract or not?

Yes	5	8.3
No	43	71.7
Don't know	12	20.0
	60	100

Table 5.13 (Q.26) Who do you think benefits from tenancy contracts?

Landlord and tenant equally	19	31 7
Landlord	28	46 7
Tenant	1	1.6
Don't know	12	20.0
	60	100 0

SECTION 6: RENT

Table 6.1 (Q.27) Does your rent become due .

Weekly	8	12.3
Fortnightly	52	87.7
Monthly	0	0.0
Other	0	0.0
Don't know	0	0.0
	60	100

Table 6.2 (Q.29) Is your rent paid . .

By cash	43	71.6
By cheque	7	11 7
Into savings/cheque account	9	15.0
Other	1	1 6
Don't know	0	0.0
	60	100.

(Q.30) Do you usually receive a full receipt for rent paid (i e amount paid and dates

Yes	45	75 0
No	14	23.4
Don't know	1	1 6
	60	100.

Table 6.3 (Q.31) How soon after paying your rent do you receive a receipt?

Immediately	33	73 3
1-2 days	4	8 9
3-7 days	5	11.1
8-14 days	0	0.0
Over 2 weeks	0	0.0
Over a month	0	0.0
Don't know	3	6.7
	45	100

Table 6.4 (Q.32) Has the rent been increased during the last 12 months?

Yes	8	1.3
No	49	81.7
Don't know	3	5.0
	60	100.

Table 6.5 (Q.33) How much a week has your rent increased in total (during the last 12 months

$0 - $9	3
$10 - $19	3
$20 +	2

Table 6.6 (Q.34) How much notice were you given before your last rent increase?

1 week or less	0
Over 1 week to 2 weeks	4
Over 2 weeks to 3 weeks	1
Over 4 weeks	3
Don't know	0

Table 6.7 (Q.35) Were you given reasons for the increase in rent?

Yes	5
No	3
Don't know	0

Table 6.8 (Q.36) What were the reasons?

Tenant responses
- increase in maintenance costs
- new plumbing
- increase in interest rates

Table 6.9 (Q 37) Do you consider your rent increase was fair?

Yes	5
No	3
Don't know	0

Table 6.10 (Q.38) Why do you consider your rent increase was unfair?

Tenant responses
- no reasons given for increase

SECTION 7: REPAIRS

Table 7.1 (Q.40) When moving in did the landlord or agent promise to do any repairs?

Yes	26	43.3
No	30	50.0
No repairs needed	4	6.7
Don't know	0	0.0
	60	100.

Table 7.2 (Q.41) What were the repairs?

Respondents identified a total of 46 repairs including the following:
- fix sink and stove
- tiles and shower, showerscreen
- mend broken stairs
- attend to broken windows*
- clean carpets
- fix clothesline
- painting*
- faulty power points
- leaking roof
- stove not working
- lights not working
- remove garden rubbish
- fix locks*
- gate/fence problems
- no window in bathroom
- installation of exhaust fan in kitchen
- broken clothesline
- door problems (nobs/shutting)*

*commonly identified defects

Table 7 3 (Q.42, 43) Repairs completed and time frame

	R1	R2	R3
Repairs promised	24	14	8
Repairs completed	16	9	7
Time frame for completion			
within 1 week	6	3	2
1 - 4 weeks	4	1	1
Over 1 month - 6 weeks	2	1	0
Over 6 months	4	4	4

Table 7.4 (Q.44) Since moving in have you asked the landlord to do any other repairs?

	Frequency	%
Yes	28	46.7
No	28	46.7
Don't know	4	6.6
	60	100.

Table 7.5 (Q.45) What were the repairs?

Respondents identified a total of 48 repairs including the following:

- broken washing machine
- problems with doors and windows*
- plumbing problems
- leaking roof*
- leaking toilet
- locks*
- guttering
- wiring problems (lights, points)
- renovations to bathroom
- old fridges (door problems)
- painting
- structural repairs (porch etc.)

Table 7.6 (Q.46, 47, 48) Repairs completed and time frame

	R1	R2	R3
Repairs requested	25	17	6
Number completed	13	10	3
Time frame for completion			
Less than 1 week	3	3	1
1 - 4 weeks	6	3	1
Over 1 month and less than 6 months	2	3	1
6 months - 1 year	1	1	-
Over 1 year	1	-	-
Length of time ago non-completed repairs were requested			
Less than 1 week	1	-	1
1 to 4 weeks	2	3	2
Over 1 month - less than 6 months	3	2	1
6 months - 1 year	4	2	-
Over 1 year	2	-	-

Table 7.7 (Q.49) Did your landlord refuse to do any repairs?

7 repairs were refused. Tenants indicated the following reasons:

- tenant responsibility
- too expensive
- not worth spending money on
- no reason given

Table 7.8 (Q.51) Since moving in have you done any reapirs at your own expense?

	Frequency	%
Yes	21	35.0
No	37	61.6
Don't know	2	3.4
	60	100.

Table 7.9 (Q.53) How much in total did you spend on these repairs?

$1 - 49	13	62.0
$50 - 99	5	23.8
$100 - $199	1	4.7
$200 - $500	1	4.7
Over $500	0	0.0
Don't know	1	4.7
	21	100

Table 7.10 (Q.54) From this list please select the reasons why this/these repairs were carried out by yourself and not the landlord or agent?

Did not think of asking landlord/agent	4
Did not ask - felt landlord/agent would refuse	5
Did not ask - job too small	6
Asked but landlord/agent refused	3
Asked but landlord/agent took too long	4
Requested by the landlord/agent to undertake repairs	0

Table 7.11 (Q.55) Since moving in have you spent your own time doing repairs?

Yes	20	33.3
No	31	51.7
Don't know	0	0.0
Not stated	9	15.0
	60	100.

Table 7.12 (Q.56) What were these repairs?

Respondents identified a total of 32 repairs, including:

- tiling in bathroom
- fixing leaks
- painting
- mending doors and windows
- gardening

Table 7.13 (Q.57) How much time did you spend on these repairs?

Responses to this question cannot be categorised, as respondents recorded totals, both in terms of hours per week, and total hours. The recorded range was between 1 hour to "countless".

Table 7.14 (Q.58) In general are you satisfied with the way the agent/owner maintains the dwelling?

Yes	31	51.7
No	26	43.3
Don't know	3	5.0
	60	100

Table 7.15 (Q.59) What are your reasons for the dissatisfaction?

Tenants responses included:

- failure to look after the dwelling
- owner lets it run down
- repeated requests to ask him to do small jobs
- can't be contacted

Table 7.16 (Q.60) Did you know you could approach the Housing Department in order to get a place inspected if you feel it is below standard?

Yes	13	21.7
No	42	70.0
Don't know	5	8.3
	60	100.

Table 7.17 (Q.61) Have you ever approached the Housing Department about a place you felt was substandard?

Yes	3	5.0
No	57	95.0
Don't know	0	0.0
	60	100.0

Table 7.18 (Q.61A) What did the Housing Department do about it?

Tenant responses:
- nothing (1)
- wrote a list of damaged items (2)
- not able to recall (1)

SECTION 8: PRIVACY AND QUIET ENJOYMENT

Table 8.1 (Q.62) Has your agent or landlord or caretaker ever visited this dwelling?

Yes	42	70.0
No	18	30.0
Don't know	0	0.0
	60	100

Table 8.2 (Q.63) How often in the past 6 months has the landlord, agent or caretaker visited?

Daily	3	7.1
More than once a week	1	2.4
Weekly	7	16.7
Fortnightly	5	11.9
Monthly	2	4.7
Every 2-3 months	9	21.4
Every 3-6 months	8	19.0
Don't know	3	7.1
Once only	4	9.5
	42	100

Table 8.3 (Q.64) Has he/she ever visited without giving adequate notice?

Yes	19	45.2
No	22	52.4
Don't know	1	2.4
	42	100.

Table 8.4 (Q.65) Has your agent, landlord or caretaker ever entered this dwelling without permission?

Yes	9	21.4
No	31	73 8
Don't know	2	4.7
	42	100.

Table 8.5 (Q.66) How would you best describe his/her visits?

Necessary and no bother	22	52.4
Necessary but a bother	3	7.0
Unnecessary but no bother	6	1 4
Unnecessary and a bother	4	9.0
An invasion of my privacy	6	14.0
No answer	1	2.0
	42	100.

SECTION 9: PREVIOUS ACCOMMODATION

Table 9.1 (Q.67) In the last 5 years have you privately rented any other dwelling in Tasmania, other than this one?

Yes	38	63.3
No	22	36.7
Don't know	0	0.0
	60	100

Table 9 2 (Q.68) Did you rent it through a real estate agent, owner or in some other way?

Real Estate Agent (REA)	8	21.0
Owner directly	25	65.8
Caretaker (rep. REA)	0	0.0
Caretaker (rep. owner)	1	2.06
Caretaker (rep unknown)	1	2.6
Other (please specify)	3	7.9
Don't know	0	0.0
	38	100

Table 9.3 (Q.69) Did you pay a bond?

Yes	31	81 6
No	7	18 4
Don't know	0	0.0
	38	100

Table 9.4 (Q.70) How much did you pay?

No bond paid	7	18.4
Less than $100	2	5.3
$100 - $199	3	7 9
$200 - $299	13	34.2
$300 - $399	5	13.2
$400 - $499	1	2.6
Over $500	1	2.6
Don't know	6	15.8
	38	100.

Table 9.5 (Q.71) When you left was your bond refunded in full?

Yes	19	61.3
No	11	35.5
Not applicable	0	0.0
Not yet refunded	1	3 2
Don't know	0	0.0
	31	100

Table 9.6 (Q.74) How much was deducted from your bond?

One third and less	2
Between one third and two thirds	2
Over two thirds	1
All of it	6

Table 9.7 (Q.73) For which of these reasons was money deducted?

Respondents indicated:

- inside cleaning
- rent owing
- no reason given
- damage to property

Table 9 8 (Q.74) Do you think the deduction was fair?

Yes	5
No	6
Don't know	0
	11

Table 9.9 (Q.75) How long after you left the property did you have to wait for your bond?

Less than 1 week	9	36.0
1 - 2 weeks	10	40.0
2 - 4 weeks	2	8.0
1 - 3 months	3	12.0
Over 3 months	0	0.0
Don't know	1	4.0
	25	100.

Table 9.10 (Q.76) Were you paid interest on your bond money?

Yes	1	3 2
No	26	83.9
Don't know	4	12.9
	31	100.

SECTION 10: EVICTION

Table 10.1 (Q.79) During the past 5 years have you ever been asked to leave, or been evicted from a place you were privately renting in Tasmania?

Yes	13	34.2
No	25	65 8
Don't know	0	0.0
	38	100.

Table 10.2 (Q.78) How many times has this occurred in the last 5 years?

1	6
2	4
3	1
More than 3	2

Table 10 3 (Q 79) The last time this occurred, what was the reason given for asking you to leave?

Tenant responses:

- house being sold
- rent arrears
- owner returning unexpectedly from overseas
- no reason
- noise level

Table 10 4 (Q.80) How much notice were you given?

Immediate	1
2 hours	1
4 hours	1
2 days	2
7 days	2
14 days	3
28 days	1
30 days	2
	13

Table 10 5 (Q.81) How often was your rent due?

Weekly	5
Fortnightly	8
Monthly	0
	13

SECTION 11: DISCRIMINATION

Table 11.1 Have you ever been refused private accommodtion, which you knew was available for renting?

Yes	19	31 7
No	37	61.7
Don't know	4	6.6
	60	100

Table 11.2 Do you think you were refused accommodation for any of the following reasons? (Multiple choice question)

Ground		
Race	2	4.3
Income	8	17.4
Age	6	13.0
Sex	6	13.0
Children	7	15 2
Student	4	8.7
Other	10	21.7
Don't know	3	6.5
	46	100.0

Two other reasons were identified by respondents as reasons for discrimination: (1) pets, (2) sexual preference

SECTION 12: SELF HELP REMEDIES

Table 11.1 (Q.85) During the time you have been renting has the landlord, agent or caretaker, ever seized any of your possessions for unpaid rent?

Yes	4	6.7
No	51	85.0
Don't know	0	0.0
No stated	5	68.3
	60	100.

Table 12.2 (Q.85A) What steps did you take to recover your possessions?

No further action	2
Unsuccessful negotiation	1
Assistance T/U (successful)	1

Table 12.3 (Q 86) Have you ever been locked out of a dwelling by the landlord, agent or caretaker?

Yes	5	8.3
No	49	81.7
Not stated	6	10.0
	60	100.

What was the result?

Entered premises by breaking in	2
No further action	2

SECTION 13: AWARENESS OF SERVICES

Table 13.1 (Q 87) If you wanted advice on tenancy matters where would you go? (Multiple choice question)

Tenants Union of Tas.	48	36.4
A.L.A.O.	12	9.1
Community Legal Service	18	13.6
Consumer Affairs Council	7	5.3
Small Claims Tribunal	6	4.5
Real Estate Agent	10	7.6
Friend/relative	14	10.6
Lawyer	11	8.3
Other	6	4.5
	132	100.

Table 13.2 (Q 88) Have you heard of the Small Claims Division of the Court of Requests?

Yes	32	53.3
No	23	38.3
Not stated	5	8.4
	60	100.

Table 13.3 (Q.89) Have you ever had a tenancy dispute dealt with by the Small Claims Division?

Yes	3	10.3
No	29	90.7
	32	100.

Table 13.4 (Q.90) Were you satisfied with the way in which the matter was dealt?

Yes	2
No	1

Table 13.5 (Q.90 on) Please explain why you were dissatisfied

Only 1 respondent dissatisfied

Reason: "landlord lied and won the case"

SECTION 14: LAW REFORM

(Q.97) What changes to the current law would be most important to you?

Tenant responses to this question are presented in Chapter 4

APPENDIX 2

A Sample of Tenancy Agreement in Use in Tasmania in 1989

2.1 Private landlord/tenant agreement. (Please note: Clauses 5, 7, 10 and 14).

2.2 Private landlord/tenant agreement. (Please note: Clauses 3, 4, 9 and 10).

2.3 Private Landlord/tenant agreement (Please note: Clause 10, on the consequences for breach of any of the rules or regulations).

2.4 Real Estate Agent Agreement (Northside Real Estate).

2.5 Launceston Nationwide Reality (Please note: Clauses (b), (d), (e) and (u). Clause 5(b) contains an interesting provision regarding "unilateral" operation of the doctrine of frustration).

2.6 Real Estate Agent Agreement: Moanes Real Estate Lease. (Please note: Clause 12).

2.7 Real Estate Agent Agreement of Lease: Whites Real Estate. (Please note: Clause 8).

2.8 Real Estate Institute of Tasmanian Lease. (Please note: Clause 4).

2.9 Real Estate Agent Agreement: Crisp, Morrisby Real Estate.

2.10 Private landlord-tenant lease. (Please note: Clause 4, in which the tenant agrees to do 4 days of manual labour, in lieu of payment of a bond!).

2.11 Private landlord-tenant agreement.

2.12 Consumer Affairs Council; Residential Tenancies Agreement.

No. 6 Lochner Street,
WEST HOBART, Tas.

APPENDIX 2.1

This is hereby to certify that between the Tenant occupier, Mr.. ...
of the Flat No. .., at the above address, and the Manager of the above flat, MR. Freeman, that the Tenants are required hereby to:

1. Not to disturb the other Tenants or neighbours nearby.

2. Keep flat tidy and clean, expecially around the window grooves, or channels, and keep noise to a minimum. Special care should be taken after 10.00 p.m.

3. The Tenants are required to pay BOND, the sum of $..150....., to Manager, which will be refunded in full to the Tenants on leaving, unless there are damages or cleaning required to flat, or any other cost.

4. RENT: must be paid in advance, weekly-fortnightly or as agreed, and is subject to be reviewed every 6 months.

* 5. Tenant should obey further instruction from Manager, if there are any.

6. The notice is on a fortnightly basis.

7. Tenants are required to insure all their contents. The Owner or Manager IS NOT responsible for any damages of the tenants property, or any injuries to themselves or their visitors.

8. The Manager reserves the right to inspect the Flat twice a month in the presence of the occupier, of if suspect of any negligence at anytime, during the day from 8.00 a.m. - 8.00 p.m. And if found necessary, dismiss Tenant with 5 days notice and loss of BOND amount necessary.

9. All fixed contents in the Flat are the Owner's property, Fully Furnished, including curtains.

10. Owner/Manager reserves the right to enter Flats at any EMERGENCY without presence of Tenants. Noticing smoke, burning, stormy weather, regarding windows left open which should not be left open when expecting bad weather, repairs etc.

11. Tenant IS NOT allowed to do any repair without Manager's permission, but should supply globes, tubes if burnt out.

12. Tenant should notify the Manager of anything unusual, such as water leaking, unusual noise, faulty handles of switches, cracks, or something found to be loose. Failure to do this is occupiers responsibility.

13. This AGREEMENT is not for less than ~~four~~ 6 months. Tenants should read this agreement before they sign the same. Once they sign this agreement, that means that they are fully agreed to all these conditions, and witnesses are NOT required.

14. No visitors are allowed to stay over night without Owners permission.

SIGNED:

TENANTS.

Mr. .....

Mrs. .....

Owner/Manager.

Mr. .....

APPENDIX 2.2

AN AGREEMENT made the 5-1-88 in the year One Thousand Nine hundred and ..... BETWEEN D. & A. DI BENEDETTO.

(hereinafter called the Landlord) of the one part AND .....

(hereinafter called the Tenant) of the other part WHEREBY in consideration of the rent hereinafter served and the covenants and conditions hereinafter contained it is agreed between the Landlord and the Tenant as follows :--

1. The Landlord agrees to let to the Tenant and the Tenant agrees to take from the Landlord all that semi furnished FB/B Allison St in Tasmania together with all fittings and fixtures as per Inventory attached hereto at a weekly rental of $ 110-00 ~~sub to rise and fall~~ payable Wednesday or Thursday between 7 & 8pm.

The rental shall be paid by the Tenant every four weeks in advance during such tenancy to ~~D. DI BENEDETTO REAL ESTATE~~ D. DI BENEDETTO

2. The tenancy shall commence on 5-1-88 until 4-7-88 and shall not determine save as hereinafter provided.

3. The Tenant agrees to use the said premises in a fair and tenantable manner and to keep, and at the end of the tenancy, to deliver up the premises to the Landlord in good repair as at present, fair tear and wear and damage by lightning or tempest or by accidental fire or flood excepted. The Tenant agrees to pay for any repairs to or cleaning of, the said premises required during the tenancy or resulting therefrom. The Tenants also agree to pay for repairs to or clearing of the sewerage water electricity or connections which are necessary owing to negligent or wrongful usage during the tenancy. The Tenant agrees to properly keep and attend to the lawn garden and shrubberies belonging to the premises.

4. The Tenant agrees to respect and use the items in the inventory attached hereto in a fair and tenantable manner and to make good from time to time such breakages or defacements which may occur to those items. All electrical units the Tenant shall at all times keep in a serviceable condition and attend to such servicing as may be necessary.

5. The Tenant agrees not to sub-let or assign over nor in any way dispose of, share or part with possession of the said premises or any part thereof to any person whomsoever without the consent in writing of the Landlord or his agent.

6. The Tenant shall not erect or inscribe on or fix to the said premises or permit to be placed thereon any hoarding, writing, sign or other similar matter.

7. The Tenant agrees to use the premises only as a dwelling and only as such for those persons hereinafter described, without the consent in writing of the Landlord or his agent first being obtained for any additional persons.

7(a) The landlord will inspect the flat periodically. The tenant to dryclean the drapes and shampoo the carpets by R. Pittorino when necessary and at the end of the tenancy. If the lease is breached the tenant is responsible for the rent and expenses until the flat is relet. The tenant is responsible for the surroundings corresponding his flat. Furniture to be removed by a removalist. No children or pets allowed. Windows to be opened as much as possible.

8. The Tenant hereby agrees that he will not make nor suffer to be made any alteration to the said premises or any part thereof without the consent in writing of the Landlord and/or his agent first had and obtained and that he will not create any nuisance nor do any act thereon which shall be an annoyance to the Landlord or to the occupier or owner of any adjoining premises nor do nor suffer to be done anything that might prejudice any policy or policies of insurance on the said premises or any part thereof.

9. The Landlord and ..... agent or workmen or prospective purchasers may enter the said premises at all reasonable times during the tenancy for the purpose of viewing the condition thereof and to do such work as may be required by the Landlord.

10. If the Tenant shall commit a breach of or fail to observe and/or perform any of the conditions or agreements contained or implied in this agreement or fail to pay the rent herein reserved as herein provided whether formally demanded or notwithstanding the waiver or any previous breach, the Landlord and/or ..... agent may re-enter upon the said premises or any part thereof (and for such purpose may break open any inner or outer door or windows without hereby becoming liable for damage trespass or otherwise) and expel and remove all persons therefrom and the tenancy hereby created shall thereupon absolutely determine, and this agreement may be produced by the Landlord or his agent as a notice to quit duly given and expired.

11. If the said premises shall be destroyed or rendered unfit for habitation by fire or from any cause other than through the negligence of the Tenants so as to prevent the proper and beneficial enjoyment thereof either party shall have the right to determine the tenancy by delivering a notice to that effect to the other party and the tenancy hereby created shall immediately after the delivery of such notice cease and be determined and become void and of no effect save as to any rent or other monies due by the Tenants to the Landlord at the date of the said determination.

12. It is hereby agreed and DECLARED that no overholding of the leased premises by the Tenant beyond the term hereby created shall be construed as creating a tenancy from year to year, but that notwithstanding the failure of the Tenants to vacate upon the expiration of the said term, or of the Landlord to require possession at such expiration or the payment and receipt of rent by the Tenants and the Landlord respectively, the Tenants' occupancy of the leased premises after the expiration of the said term may be determined by the Landlord at any time upon ..... notice which may be given at any time.

13. The Tenants hereby covenant to pay the amount of $ 300-00 on the signing hereof to D. DI BENEDETTO REAL ESTATE who shall act as stakeholder. This amount represents a security bond which shall be refunded to the tenants in full upon the expiration of the Lease Agreement PROVIDED ALWAYS that the leased premises are in a satisfactory condition which same will be established after inspection by the Landlord and/or his Agent.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year firstly hereinbefore written.

SIGNED BY THE LANDLORD ..... D. Di Benedetto

IN THE PRESENCE OF .....

.....

Assessor of Stamp Duties 7 JAN 1988

Date

612402

RULES & REGULATIONS APPLICABLE TO TENANTS

DATE 17.8.87

1. I agree to pay $300.00 Bond on Flat 1/22 Swan Street, North Hobart.

2. To be returned to me on vacating the flat after 6 months tenancy.

3. Providing I leave this flat as I find it in a good clean condition.

4. Should I vacate the above flat before the end of 6 months I do hereby forfeit my bond and agree to pay for any damaged or lost articles incurred whilst I held tenancy.

5. At no time is this flat to be sublet by the tenant without the Landlord's permission.

6. No pets allowed on these premises.

7. No durex or stickers to be adhered to walls or furniture.

8. I agree to pay my rent strictly fortnightly in advance.

9. The Landlord reserves the right to inspect this flat at any time if he has reason to suspect the tenant of misusing it in any way.

10. Should I break any of these rules and regulations, I give the Landlord permission to put my goods and chattels out of this flat without any prior notice and without any court action taken.

Signature of Tenant: .....

Witness: Fay Oakley

MOANES PHONE: 72,3511

APPENDIX 2.4

Northside Real Estate

239 MAIN ROAD, GLENORCHY

AN AGREEMENT - made the .....15th...July..... in the year One Thousand Nine Hundred and .....Eighty....Seven.....

BETWEEN .....

.....

(hereinafter called the Landlord) of the one part -

AND .....

.....

(hereinafter called the Tenant) of the other part -

WHEREBY - In consideration of the rent hereinafter served and the covenants and conditions hereinafter contained, it is agreed between the landlord and the Tenant as follows:-

1. The Landlord agrees to let to the Tenant and the Tenant agrees to take from the Landlord all that .property...situated...at...124.....
.Hopkins...St...Moonah...in...Tasmania.....
The Tenant shall pay the rental every .week...at...$110.-.....
during such tenancy to MOANE'S NORTHSIDE REAL ESTATE, 239 Main Road, GLENORCHY.

2. The Tenancy shall commence on ....15/7/87.....
until ...15th...January...1988.. and shall determine save as hereinafter provided.

3. The Tenant agrees to use the said premises in a fair and tenantable manner and to keep and at the end of the tenancy to deliver up the premises to the Landlord in good repair as at present, fair tear and wear and damage by lightning or tempest or by accidental fire or flood excepted. The Tenant agrees to pay for any repairs to, or cleaning of, the said premises required during the tenancy or resulting therefrom. The Tenant also agrees to pay for repairs to or cleaning of, the sewerage, water, electricity or connections which are necessary owing to negligent property use, or wrongful usage during the Tenancy. The Tenant agrees to properly keep and attend to the lawn, garden and shrubberies belonging to the premises.

4. The Tenant agrees to use the said premises in respect and to use the items in the inventory attached hereto in a fair and tenantable manner and to make good from time to time such breakages or defacements which may occur to those items. All electrical units the Tenant shall at all times keep in a serviceable condition and attend to such servicing as may be necessary.

5. The Tenant agrees not to sub-let or assign over, nor in any way dispose of, share or part with possession of the said premieses or any part thereof to any person whomsoever without the consent of the Landlord or his Agent, in writing.

6. The Tenant shall not erect or inscribe on or fix to the said premises or permit to be placed thereon, any hoarding, writing, sign or other similar matter.

7. The Tenant agrees to use the premises only as a Dwelling and only as such for those persons hereinafter described without the consent in writing of the Landlord or his Agent first being obtained for any additional persons.

8. The Tenant hereby nominates that the following are those persons normally having cause to reside at the premises herein described.

.....

.....

1 cat -

3b. The Tenant hereby agrees that he will not attempt to make, nor suffer to be made any alteration to the said premises or any part thereof without the consent in writing of the Landlord and/or his Agent first had and obtained and that he will not create any nuisance nor do any act thereon which shall be an annoyancy to the Landlord or to the occupier or owner of any adjoining premises nor do nor suffer to be done, anything that might prejudice any policy or policies of insurance on the said premises or any part thereof.

9. The Landlord and .Or..Their....., Agent or Workmen or Prospective Purchasers may enter the said premises at all reasonable times during the tenancy for the purpose of viewing the condition thereof and to do such work as may be required by the Landlord.

10. If the Tenant shall commit a breach of or fail to observe and/or perform any of the conditions or agreements contained or implied in this Agreement or fail to pay the rent herein reserved, as herein provided whether formally demanded or not withstanding the waiver or any previous breach, the Landlord and/or ...Their..... Agent may re-enter upon the said premises or any part thereof or windows without hereby becoming liable for damage, trespass or otherwise, and expel and remove all persons therefrom and the tenancy hereby create d shall thereupon absolutely determine and this Agreement may be produced by the Landlord or his Agent as a notice to quit duly given and expired.

11. If the said premises shall be destroyed or rendered unfit for habitation by fire or from any cause other than through the negligence of the Tenants so as to prevent the proper and beneficial enjoyment thereof either party shall have the right to determine the tenancy by delivering a notice to that effect to the other party and the Tenancy hereby created shall immediately after the delivery of such a notice, cease - and be determined and become void and of no effect save as to rent or other monies due by the Tenants to the Landlord at the date of the said determination.

12. It is hereby agreed and declared that no overholding of the leased premises by the Tenant beyond the term hereby created shall be construed as creating a Tenancy from year to year, but that not withstanding the failure of the Tenants to vacate upon the expiration of the said term, or of the Landlord to require possession at such expiration or the payment and receipt by rent by the Tenants and the Landlord respectively, the Tenants occupancy of the leased premises after the expiration of the said term may be determined by the Landlord at any time upon ....One...Weeks..... notice which may be given at any time.

13. The Tenants hereby covenant to pay the amount of ...$.440.-..... on signing hereof to MOANE'S NORTHSIDE REAL ESTATE, 239 Main Road, Glenorchy, who shall act as Stakeholder.
This amount represents a security bond which shall be refunded to the Tenants in full upon the expiration of the Lease Agreement PROVIDED ALWAYS that the leased premises are in a satisfactory condition which same will be established after inspection by the Landlord and/or his Agent.

. It is recognised by the Tenants herein that the security bond of $.440.-.. represents a bond for the repair and maintenance of the property through damage caused by the tenant and the bond also acts as security against the Tenants breaking of the above lease and its rent obligations.

WITNESS WHEREOF The parties hereto have hereunto set herein hands, the day and year firstly hereinbefore written.

GNED BY THE LANDLORD ..On..Behalf...of...the..landlord.

the Presence of .....X.DuGuesk.....

GNED BY THE TENANTS ..X.....

the Presence of .....X.....

APPENDIX 2.5

23 NOV

THIS LEASE is made the 18th day of November One thousand nine hundred and eighty eight BETWEEN MR + MRS .

C/O Launceston Nationwide Realty, 113 George Street, Launceston in Tasmania (hereinafter called "the lessor" which expression shall where the context so admits include the person for the time being entitled to the reversion immediately expectant on the determination of the term hereby created) of the one part and

(hereinafter called "the lessee" which expression shall include the lessee's personal representatives and permitted assigns) of the other part

NOW THIS DEED WITNESSES AS FOLLOWS:

1. IN this lease:

(a) words importing the singular or plural number include the plural and singular number respectively and words of any gender shall include any other gender.

(b) where more persons than one accept liability under any covenant or obligation herein each of such persons shall be liable severally and every two or greater number of them shall be liable jointly.

2. THE lessor hereby demises unto the lessee ALL THAT the premises described in the First Schedule hereto (hereinafter called "the property") TO HOLD the same unto the lessee for a period of

at a rental payable as follows, that is to say: a weekly rental of $110-00 (one hundred & ten Dollars) payable weekly in advance on Friday of each week during the said term, the first of such weekly payments to be made on the 18th day of November 1988.

This is to certify that this instrument was produced to me pursuant to Section 11 of the Stamp Duties Act 1931 on the 23rd day of November 1988 and that upon being so produced the full amount of duty (namely $ 20.00) was duly deposited thereon.

23 NOV 1988 Assessor of Stamp Duties

Date

3. THE lessee hereby covenants with the lessor as follows :

(a) to pay the said rent on the day and times hereinbefore appointed for the same without any deductions or abatement whatsoever such rent to be paid to the lessor or to such person and at such place as the lessor shall nominate from time to time.

(b) at all times during the said term and so often as occasion shall require well and sufficiently to repair uphold cleanse and keep the property in such good and tenantable repair and condition as the same is in at the commencement of the term of this lease (fair wear and tear damage by fire storm tempest or acts of the Queen's enemies only excepted).

(c) well and properly to maintain tend and keep up the gardens surrounding the dwelling house situate on the property.

(d) at the expiration of the said term hereby created to quit and deliver up possession of the property in such good tenantable order and repair except only as aforesaid.

(e) to permit the lessor or his agent either alone or with any other person or persons whomsoever at all reasonable times to enter into and upon the property to view and examine the state and condition thereof and if any defects or want of reparation shall be then found or appear the lessee on receiving notice thereof shall cause all such to be forthwith amended or made good. In the event of the lessee failing to comply with such notice within a reasonable time then the lessor may enter upon the demised premises and at the expense of the lessee make good such defects or want of reparation.

(f) not without the consent in writing of the lessor to cut down or destroy or permit or suffer to be cut down or destroyed any trees or timber growing on the property.

(g) not to assign underlet or part with the possession of the property or any part thereof without the previous consent in writing of the lessor.

(h) to pay to the lessor as soon as the lessor has incurred or expended the same all moneys costs charges and expenses which the lessor may incur or expend in consequence of any default by the lessee in the performance or observance of any covenant or agreement herein contained and to be performed or observed by the lessee or under or in the exercise or enforcement or attempted exercise or enforcement of any power or authority herein contained.

(i) not to do or permit to be done anything which may render any increased premiums payable for the insurance of the property or which may make void or voidable any policy for such insurance.

(j) not to do or permit to be done on the property anything which may be a public or private nuisance or annoyance or may in any way interfere with the quiet enjoyment by adjoining owners and occupiers.

(k) to pay all charges in respect of gas and electricity used on the property and all charges for excess water.

(l) not to keep any pets in on or about the property.

(m) not to use the property for any purpose other than that of a dwelling.

(n) to give notice promptly to the lessor of all damage done to the property or repairs required to be done to the property regardless of whether it is the lessee's or the lessor's obligation to effect repairs.

(o) not to cut make holes in mark deface drill damage nor suffer to be cut holed marked defaced drilled or damaged any of the floors walls ceilings or other parts of the property.

(p) not to bring upon or store on the property any explosive or any inflammable or corrosive fluids or substances.

(q) to promptly repair or replace all broken cracked or damaged glass in the property or in any wall forming part of the property.

(r) to unblock or pay the cost of unblocking any drains connected to or servicing the property.

(s) not to permit the water closets lavatories grease traps and other sanitary appliances to be used for any purpose other than that for which they were constructed and no sweepings rubbish rags ashes or other substance shall be thrown therein.

(t) to replace as and when necessary all electric light globes and tubes and all tap washers.

(u) to pay all government stamp duty chargeable in respect of this lease and the lessor's legal costs incurred in the drawing of this lease.

(v) not without the previous consent in writing of the lessor to make or suffer to be made any structural alterations to the premises or to cut maim injure or suffer to be cut maimed or injured any of the walls or maim timbers thereof.

4. THE lessor hereby covenants with the lessee as follows:

(a) that the lessee paying such rent hereby reserved on the several days bereby appointed for the payment thereof and observing and performing the several covenants and provisoes herein mentioned shall and may peaceably and quietly have hold use and occupy the demised premises for all the said term hereby created without any hinderance or molestation from or by the lessor or any other person or persons lawfully and rightfully claiming from through or under the lessor.

(b) to keep the exterior of the said dwelling house and the roof floors and main walls and timbers and main drains in good and tenantable repair and condition PROVIDED ALWAYS that the lessor shall not be responsible or liable to the lessee for any damage caused to the interior of the said dwelling house or to any chattels of the lessee by the entry of water into or upon the said dwelling house.

(c) to pay all land tax and rates and other municipal charges in respect of the property with the exception of any excess water rate which rate shall be paid by the lessee.

5. PROVIDED ALWAYS and it is hereby agreed and declared as follows :

(a) that if the rents hereby reserved or any part thereof shall be at any time unpaid for 14 days after becoming payable whether formally demanded or not or if the lessee's covenants or any of them shall not be performed or observed or if the lessee becomes bankrupt or makes any assignment for the benefit of creditors or enters into an agreement or makes any arrangements with creditors for liquidation of his debts by composition or otherwise or permits any distress or process of execution to be levied upon him or his goods then in any of the said cases the lessor may at any time thereafter re-enter upon the property or any part thereof in the names of the whole and thereupon the term hereby created shall absolutely determine but without prejudice to the right of action or remedy of the lessor in respect of any antecedent breach of any of the lessee's covenants.

(b) If any building on the property or a substantial part thereof shall during the term hereby created be destroyed or rendered unfit for use by fire storm or tempest and the policy or policies of insurance effected by the lessor shall not be vitiated or payment of the policy moneys refused in consequence of some act or default of the lessee or any employee or servant or agent of the lessee then a fair and just proportion of the rent hereby reserved according to the nature or extent of the injury sustained shall be suspended until the said building shall be again rendered fit for occupation and use. PROVIDED THAT the lessor may within 30 days of such damage occuring at his sole direction terminate this lease.

(c) that if after the termination of the term hereby created the lessee shall hold over the property such holding over coupled with the acceptance of rent by the lessor shall under no circumstances be considered as constituting a tenancy from year to year but shall be upon all the terms of these presents applicable thereto and shall be determinable by either party by giving to the other party two week's

notice in writing commencing at any time of the intention of the party giving the notice to determine the said tenancy and upon the expiration of such notice the said tenancy shall determine but without prejudice to the right of either party to recover compensation for any breach of agreement occurring antecedent to such determination.

6. THE lessee shall upon the signing hereof pay the lessor the sum of three hundred Dollars ($300-00)

which (or any part of which) the lessor shall be entitled to use in making good or repairing any damage caused to the property by the lessee. Recourse by the lessor to the said sum shall be entirely without prejudice to any other right or remedy which the lessor may have or pursue against the lessee.

7. ANY notice under this lease shall be in writing. Any notice to the tenant shall be sufficiently served if left addressed to him on the property or sent to him by prepaid post or left at his last known address in the State of Tasmania and any notice to the lessor shall be sufficiently served if delivered to him personally or sent to him by prepaid post or left at his last known address in the State of Tasmania.

THE SCHEDULE

ALL THAT dwelling house with outbuildings (if any) yard and garden thereto known as no. 2/29 Herbert Street, Invermay

AS WITNESS the hands of the parties the day and year first hereinbefore written

SIGNED by the lessor)
in the presence of :)

Launceston
Nationwide Realty
For + on behalf of the landlord
E Lapsett.

SIGNED by the lessee)
in the presence of:)

× J Hurdley
E Lapsett

Introduced late 88

APPENDIX 2.6

ANNEXURE "A"

HOUSE RULES

The Tenant shall before vacating the premises:—

1. Polish all floors and clean all carpets.
2. Remove all marks from walls.
3. Clean the stove at back, sides, front, top and inside.
4. Clean all venetian blinds.
5. Clean all windows and doors internally and externally.
6. Clean sinks, hand basins, bath, shower recess and toilet.
7. Defrost and clean refrigerator, turn off power and leave door open.
8. Ensure that all lawns are mown and the garden is in good order and condition and weed free.

TASMANIAN STAMP DUTY PAID 20/09/88
D 6 116 $20.00

The duty payable hereon was this day assessed by me at $ Nil

Assessor of Stamp Duties

Date 20/9/88

Agreement for Tenancy

DATED 7 - 9 - 1988

Between

and (Landlord)

(Tenant)

Premises 213 Warwick St West Hobart

MOANES REAL ESTATE
239 MAIN ROAD,
DERWENT PARK.

1 *An Agreement* made this 7th day of Septembe 19 88

BETWEEN.....

(hereinafter called "the Landlord" which expression shall where the context requires or admits include the person or persons for the time being entitled to receive and to enforce payment of the rent hereby reserved) of the one part and

.....

(hereinafter called "the Tenant" which expression shall where the context requires or admits include his executors administrators or assigns) of the other part **WITNESSETH** as follows:

1. THE Landlord agrees to let and the Tenant agrees to take ALL THAT premises, land and appurtenances thereto situate at
in Tasmania and hereinafter called "the premises" together with the furniture and effects therein (as same are more particularly described in the Inventory annexed hereto) for the term of ~~three~~ six months commencing on 9th Sept 88 until 9th ~~March~~ MARCH 1989
at a rent of $ 110pw per week payable weekly in advance to Moane's Real Estate at 239 Main Road, Derwent Park without any deduction whatsoever on the day of every week.

2. THE Tenant hereby agrees with the Landlord as follows:
(1) To pay the said rent on the days and in the manner aforesaid clear of all deductions whatsoever
(2) To keep all glass in the window frames and keep same clean and all shutters locks and fastenings bells doors and internal fittings and fixtures in good and tenantable repair and in that state deliver up possession of them at the end of the tenancy (fair wear and tear and damage by fire storm or tempest only excepted). Also sinks drains W.C.'s and all other sanitary arrangements clean and free from rubbish and in that state give up possession of them at the end of the tenancy.
(3) To make good repair or restore or (at the option of the Landlord) to pay for all such of the articles of furniture and effects as shall be broken lost damaged or destroyed during the said term (reasonable use and wear and tear and damage by accidental fire excepted).
(4) Not to make or suffer to be made any alteration in or addition to the premises or any part thereof without the prior consent in writing of the Landlord or his agent and not to drive nails or screws into the walls so as to cause damage or attach anything to walls or other surfaces in such a way that may cause marking or damage.
(5) Not to do or suffer to be done on the premises anything which may be or become a nuisance or annoyance to the Landlord or to the Tenants of the adjoining premises or may prejudice any insurance on policy or policies of the premises against fire or otherwise or increase the ordinary premium thereon. Excess noise to be restricted at all times and particularly after 10.30pm.
(6) Not to damage or injure or suffer to be damaged or injured the premises or any part thereof.
(7) To preserve the said furniture and effects from being destroyed or damaged.
(8) Not to remove any of the said furniture and effects from the premises and to leave the same at the termination of the tenancy in the several rooms and places as described in the said inventory or as found at the commencement of the said term.
(9) Not to assign underlet or part with the possession of the premises or any part thereof without the prior consent in writing of the Landlord or his agent.
(10) Not to carry on any profession trade or business on the premises or place or exhibit any noticeboard or notice whatsoever on any portion of the premises or use the premises or any part thereof for any other purpose than that of a private dwelling.
(11) To permit the Landlord or the Landlord's agents at all reasonable times of the daytime to enter upon the premises to view the state and condition thereof and of the said furniture and effects,
(12) To yield up the premises at the expiration or sooner determination of the tenancy together with the said furniture and effects in the same clean state and condition as they shall be in at the commencement of the tenancy save as aforesaid.
(13) To pay for the cleaning of carpets and curtains which shall have been unreasonably soiled during the tenancy (the reasonable use thereof to be allowed for nevertheless).

(14) To replace all faulty electric light, globes or tubes that may become defective during tenancy.

(15) At any time within fourteen days prior to the expiration of the tenancy to permit the Landlord or his agent to affix upon the said premises a notice for re-letting the same and during the same period to permit persons with written orders from the Landlord or agent at reasonable hours of the day to view the said premises.

(16) To pay for all electricity which shall be consumed or supplied on or to the premises during the tenancy and if a telephone is installed the amount of all telephone calls and charges made for the use of the telephone on the premises during the tenancy. Such telephone is not to be removed or disconnected from the premises without the Landlords authority.

(17) Not to keep dogs, cats birds or other pets anywhere on the premises without the written permission of the Landlord or his agent.

(18) That the premises are to be occupied by the Tenant only.

(19) To leave the laundry and toilet in a clean and tidy condition fit for use and to leave the washing machine clean and dry after use. Clothing or other articles to be hung on clothesline provided and not outside windows, or on other walls or any other outside surface or railing.

(20) To place all garbage in garbage containers, all wet, offensive or high smelling material to be effectively wrapped in paper and to be responsible for putting rubbish containers out on regular collection days each week and to be responsible for keeping rubbish container clean and lid attached.

(22) To pay the Government Stamp Duty assessed on this tenancy agreement.

(23) To pay to Moane's Real Estate as Agent for the Landlord on or before the signing hereof a bond of $...400.... which sum shall be refunded to the Tenant on termination of this tenancy agreement and the vacation of the premises by the Tenant, provided that the Landlord shall be entitled to deduct from the said sum or apply the same towards the satisfaction of any amount that may be payable to the Landlord as a result of any breach by the Tenant of any of the terms and conditions or covenants of this tenancy agreement and provided further that such deductions shall not be deemed to waive the Tenants breach.

(24) To keep all lawns properly cut and watered and the garden in good order and condition and weed free,

(25) To pay all costs and expenses in relation to the heating system including cost of oil/gas and servicing charges.

(26) To hire and pay for chimney sweep to clean and sweep the chimney before the onset of each winter. This clause is valid only for wood fires either combustion or open and only if the chimney has not been swept within 6 months.

3. IN case the said rent or any instalment or part thereof shall be in arrears for the space of fourteen days after the same shall have become due whether legally demanded or not or if there shall be a breach of any of the agreements by the Tenant herein contained or if the Tenant shall become bankrupt or assign his estate or execute any deed or arrangement for the benefit of his creditors or if the premises shall be left vacant or unoccupied it shall be lawful for the Landlord to re-enter upon and take possession of the premises and immediately thereupon the tenancy hereby created shall absolutely determine but without prejudice to any right of action which the Landlord may have to recover all such rent in arrears and damages in respect of any breach of this agreement.

4. THE Landlord hereby agrees with the Tenant to pay and to indemnify the Tenant against all rates taxes assessments and outgoings in respect of the premises except the said charges for the supply of electricity or telephone calls rent and fuel and servicing charges for the heater (if any) to or upon the premises during the tenancy hereby created which shall be paid by the Tenant as herinbefore provided.

5. THE Landlord hereby agrees with the Tenant that the Tenant paying the rent and performing all the agreements by the Tenant herein contained may quietly possess and enjoy the premises during the tenancy without interruption from the Landlord (there meaning only the said party hereto personally and not any other reversioner or reversioners) or any person claiming under or in trust for him.

6. THE Landlord and the Tenant hereby agree that the Tenancy hereby created is for the said term and either party may upon giving to the other party fourteen days notice in writing immediately prior to the expiration of the said term from the commencement hereof of his intention to determine the tenancy hereby created then at the expiration of such fourteen days shall cease and determine.

7. IF the Tenant fails to return the keys to the premises to Maone's Real Estate by 10am on the day on which the Tenant vacates the premises then the Tenant shall pay to the Landlord a sum equivalent to one days rent for each day that the said keys are not returned as aforesaid.

8. IT is hereby expressly agreed between the Landlord and the Tenant as follows:

(a) That the Landlord or his agent may at any time during the Tenancy hereby created or any extension thereof upon giving twenty-eight days notice in writing to the Tenant of an increase in the rental payable hereunder and payment of such increased rental shall commence upon the expiration of such twenty-eight days PROVIDED THAT the Tenant shall have the right upon giving fourteen days notice in writing to the Landlord or Moane's Real Estate to terminate the tenancy hereby created.

(b) That if the Tenant vacates the premises before the expiration of the Tenancy hereby created pursuant to paragraph 8 (a) hereof then the Tenant shall pay to the Landlord a re-letting fee and continue to pay rent on the due dates until the premises are re-let or the agreement expires.

(c) That the house rules annexed hereto and marked with the letter "A" shall be deemed to be incorporated in and form part of this agreement.

IN THIS AGREEMENT the singular shall include the plural and the male shall include the female.

INVENTORY OF FURNITURE AND FITTINGS

All fixtures, fittings, drapes, carpets light fittings, 1 Chef Stove, Indesit Fridge, Kitchen tidy, bar electric heater, 4 Chairs, Wall hanging, garbage bin, dustpan & broom, table, garden hose, dressing table, Whirlpool Twin Tub W/M, clothes line, cane blinds x 3. 2 door Wardrobe.

KEYS ISSUED:

AS WITNESS the hands of the said parties the day and year first above written.

SIGNED by the said
TENANT
in the presence of

SIGNED by the said [signature] **for and on behalf of the**
LANDLORD **by his agent**
in the presence of

For State Stamp Duty Purposes Only.

GREEMENT OF LEASE.

Stamp Duty Paid on
Amount paid:

APPENDIX 2.7

N AGREEMENT, made this.. day of. ... between ....
.....of .c/-....White's.Real.Estate.of..116.Main.Road,.Moonah....
n Tasmania (hereinafter called "the Landlord") and .. ..
.....of...1/31.Church.Street,.North.Hobart.....
n Tasmania (hereinafter called "the Tenant"), which expression shall where the context equire include his executors administrators or asigns) WHEREBY IT IS AGREED as follows:

. The Landlord agrees to let and the tenant agrees to take that premises situated at.....
...3.Linden.Rd,.Risdon.Vale.....(hereinafter called "the premises") for the term f .....12.months.....commencing on the . day of it eing expressly provided that if at the expiration of this period of time the Landlord ermits the Tenant to remain in the said premises, then the tenancy shall continue as a ....weekly.....tenancy and shall not be regarded as being a term of any greater ength of time.

. The rental shall be the sum of .....per week payable weekly or Fortnightly ..... in advance.

. The Tenant hereby agrees with the Landlord as follows:

a) To pay the said rent as here before provided clear of all deductions.

b) To keep all the fixtures and fittings in the said premises including glass, door locks, ells and all other fittings in good and tenantable repair and to deliver up possession of hem such condition at the end of the tenancy (fair wear and tear expected).

c) To keep all drains, sinks and toilets clean and free from obstruction and keep all himneys and the yard of the premises clean and tidy.

d) To make good, restore or repair (or so requested by the Landlord to pay for) any ixtures, fittings, furniture or effects which are damaged or lost during the said term.

e) Not to damage or injure the premises or drive nails in furniture, fittings or into the alls, accountrements or other portion of the premises so as to cause damage.

f) Not to do, permit to do or suffer to be done on the premises any thing that may become nuisance or annoyance to the Landlord or the occupiers of adjoining premises.

g) Not to do or suffer or permit anything to be done on the premises which may operate or itiate any policy of insurance or anything that may increase the premium payable therefore.

h) Not to remove any of the fixtures or fittings except for the purpose of repair thereof nd then only after the consent of the Landlord has been given.

i) To permit the Landlord, or his agent, at all reasonable times during the day to enter pon the premises, to view the state and condition thereof.

j) To yield up the premises at the expiration or the demise or at termination of the enancy together with fittings and fixtures on the premises in the same clean state and ondition as they shall be in at the commencement of the tenancy.

k) To pay for the cleaning of the curtains on the premises.

l) To pay for all charges of electricity in respect of the premises during the tenancy nd to indemnify the Landlord with respect to any claim made therefor.

m) Not to assign underlet or part with possession of the premises or any part thereof.

.HOULD, the said rent or instalments or any part thereof be in arrears for 14 days
.ter the same shall have become due whether legally demanded or not or if there be a
reach of any of the obligations of the tenant herein contained or if the Tenant shall
ecome bankrupt or assign his estate or execute any deed or arrangement for the benefit of
is creditors or if the premises shall be left vacant or unoccupied without the consent of
he Landlord first had and obtained it shall be lawful for the Landlord to re-enter upon
he premises or any part thereof in the name of the whole and take possession of the
remises whereupon the tenancy hereby created shall immediately and absolutely
letermine but without prejudice to any right of action which the Landlord may have for any
lamage in respect of any breach by the tenant of the agreement.

. The Landlord hereby agrees with the tenant:-

a) To pay and indemnify the tenant against all rates and land taxes.

b) The tenant paying the rent and performing all the agreements by the tenant herein
ontained and continued may quietly possess and enjoy the premises during the tenancy
ithout any interruptions from the Landlord or any person claiming under or on behalf or in
rust for him.

. In this agreement where the context so requires words importuning the singular only
hall extend to several persons and words importuning the masculine gender only shall
xtend to a female.

DDITIONAL CLAUSES RELATED TO BOND.

. A Bond of .. .. will be paid by the Tenant and it will be held in trust by White's
eal Estate and its return shall be at the discretion of the Landlord.

. The Tenant may loose all or part of the bond paid for any wilful breach of this lease
greement what-so-ever.

. White's Real Estate at no time what-so-ever will be responsible to any of the parties
oncerned for any amount greater than the amount of the bond paid by the Tenant.

S WITNESSED at the hands of the parties this day of the year.

igned by the Landlord the said ....

Witnessed .....

gned by the Tenant the said .....

Witnessed .. ..

ite .....

st of Chattles and Fittings.

oor coverings (carpet in hall damaged)
ght fittings
ectric Stove
nyl couch (damaged)
netian blinds (2 damaged)
Vinyl Chairs
tchen Table
kitchen chairs

Government Stamp Duty.....

AGREEMENT made the day of 19 BETWEEN

in the State of Tasmania (hereinafter called

"the Landlord") of the one part and of

in the State of Tasmania

(hereinafter called "the Tenant") of the other part.

WHEREBY:

1. The Landlord lets and the Tenant takes ALL THAT dwelling (flat (house

situate and being.....

in Tasmania

with the outbuildings yard and garden used and enjoyed therewith together with all fixtures pertaining thereto and the items of furniture etc. mentioned in the schedule hereto (hereinafter called "the said premises").

TO HOLD the same from the.....day of.....19.....

Strike out whichever does not apply.

until the.....day of.....19.....

TO HOLD the same on a weekly/monthly tenancy until lawful determination at a rental of

payable by equal payments on the

PROVIDED that if the Landlord permits the Tenant to continue in occupation of the said premises after the expiration of the above term the tenancy shall continue as a weekly/fortnightly tenancy only at a rental of
to be determined by one weeks notice in writing on either side such notice may be given on any day of the week.

2. THE TENANT agrees with the Landlord as follows:

(a) To pay the said rent at the times aforesaid.

(b) To pay all charges for excess water, electricity and gas imposed or used upon the said premises.

(c) (i) To keep the said premises and the Landlords fixtures and the items mentioned in the schedule hereto and the sanitary and water apparatus thereof and all internal fittings clean and in good tenantable repair and condition (fair wear and tear and damage by fire storm or tempest excepted).

(ii) To keep all the glass in all windowframes clean and undamaged at all times.

(iii) Not to throw or permit to be thrown any fat, tea leaves or other solid matter down any sink, drain or pipe within or on the premises and agrees to carry out at his own expense any repairs to the drainage or sewerage system or sinks of the premises caused by reason of the neglect to observe this clause on the part of the Tenant or any person using the premises during the tenancy hereby granted.

(iv) To make good repair or restore or (at the option of the Landlord) to pay for all such of the articles of Furniture and Effects as shall be broken lost damaged or destroyed during the said term (reasonable use and wear and tear and damage by accidental fire excepted).

(v) Not to make any alteration in or addition to the premises and not to paint drive nails or screws in to the walls, ceilings or floors or Landlord's fittings and fixtures nor to fix anything to the walls which will mark or damage the walls or paint work.

(d) At the conclusion of the tenancy to yield up "the said premises" and the outside areas in good and tenantable repair and condition and to pay the cost of any cleaning or gardening to restore "the said premises" to the condition as at the commencement of the tenancy (fair wear and tear and damage by fire storm or tempest excepted).

(e) To permit the Landlord and his agents at all reasonable times to enter upon the said premises to examine the state of repair and condition thereof.

(f) To use the said premises as a private dwelling-house only. Not to make any alterations or additions to the said premises and not to conduct any auction sale without the Landlord's written consent.

(g) Not to assign underlet or part with the possession of the said premises without the consent in writing of the Landlord.

(h) Not to do or suffer to be done in or upon the said premises or any part thereof anything which may cause damage or be a nuisance or inconvenience or annoyance to the Landlord or the occupiers of adjoining premises nor anything which may prejudice any insurance of the said premises.

(i) Not to remove any of the said Furniture and Effects from the premises and to leave the same at the termination of the tenancy in the several rooms and places as described in the said inventory or as found at the commencement of the said term.

(j) Not to carry on any profession trade or business on the premises or let apartments or receive paying guests on the premises or place or exhibit any notice board or notice whatsoever on any portion of the premises or use the premises or any part thereof for any other purpose than that of a private residence.

(k) To replace all faulty electric light, globes or tubes that may become defective during the tenancy.

(l) At any time within prior to the expiration of the tenancy to permit the Landlord or his agent to affix upon the said premises a notice for re-letting the same and during the same period to permit persons with written orders from the Landlord or agent at reasonable hours of the day to view the said premises.

3 THE LANDLORD agrees with the Tenant as follows:

(a) That the Tenant paying the rent and observing the stipulations on his part herein contained shall during the tenancy quietly enjoy the said premises without interruption by the Landlord or any person lawfully claiming under or in trust for him.

(b) To pay all Municipal Rates, all Land Tax and all insurance premiums.

4 In case the said rent or any instalment or part thereof shall be in arrear for the space of seven days after the same shall have become due whether legally

demanded or not or if there shall be a breach of any of the agreements by the Tenant herein contained or if the Tenant shall become bankrupt or assign his estate or execute any deed or arrangement for the benefit of his creditors or if the premises should be left vacant or unoccupied it shall be lawful for the landlord to re-enter upon and take possession of the premises and immediately thereupon the tenancy hereby created shall absolutely determine but without prejudice to any right of action which the Landlord may have to recover all such rent in arrear and damages in respect of any breach of this agreement.

5 The Tenant shall, on or before the signing hereof, pay to the Landlord or his agent as the Landlord may direct a deposit of $ which sum shall be refunded to the Tenant on the termination of this Lease and the vacation of the premises by the Tenant provided that the Landlord shall be entitled to deduct from the said sum or apply the same towards the satisfaction of any amount that may be payable to the Landlord as a result of any breach by the Tenant of any of the terms conditions or covenants of this Lease and provided further that such deduction shall not be deemed to waive the Tenant's breach.

6 The Tenant agrees to pay the Government Stamp Duty imposed on this tenancy agreement.

7 In this agreement the singular shall include the plural and the male shall include the female.

IN WITNESS whereof the parties hereto have hereunto set their hands the day and year first herein before written.

THE SCHEDULE ABOVE REFERRED TO

(This Schedule shall include all items such as curtains etc. and furniture).

SIGNED by the said

in the presence of

SIGNED by the said

in the presence of

AN AGREEMENT made the 5th Day of April in the year One Thousand Nine hundred and

BETWEEN S.M.C.

of C/- Office

(hereinafter called the Landlord) of the one part AND.....

8 Crosby Road, Rosetta,

of

(hereinafter called the Tenant) of the other part WHEREBY in consideration of the rent hereinafter reserved and the covenants and conditions hereinafter contained it is agreed between the Landlord and the Tenant as follows :—

1. The Landlord agrees to let and the Tenant agrees to rent from the Landlord ALL THAT (in condition as at resent and the same as now viewed by the Tenant herein) Flat 3/ 64 Derwentwater Avenue, Sandy Bay aforesaid (hereinafter called the premises) in Tasmania together with all fittings and fixtures as per inventory and description attached hereto at a weekly rental of $ payable ~~weekly~~/fortnightly/~~monthly/calendar monthly~~ in advance by an amount of $ 98.00 the said payable by the Tenant every second Monday during such tenancy to CRISP, MORRISBY REAL ESTATE, 119 Collins Street, Hobart.

2. The tenancy shall commence on for a term terminating on and shall not determine save as hereinafter provided.

3. The Tenant agrees to use the premises in a fair and tenantable manner and to keep, and at the end of the tenancy, to deliver up the premises to the Landlord in good repair as at present, fair tear and wear and damage by lighting or tempest or by accidental fire or flood excepted. The Tenant agrees to pay for any repairs to, or cleaning of, the premises required during the tenancy or resulting therefrom. The Tenant also agrees to pay for repairs to or cleaning of the sewerage water or electricity connections which are necessary owing to negligent or wrongful usage during the tenancy. The Tenant agrees to keep all lawns properly cut and watered, the whole of the garden weed free and in good order and/or in condition as at present, not keep any animals or birds anywhere on the premises or install a waterbed without the permission of the Landlord or his Agent being first had and obtained.

4. The Tenant agrees to respect and use the items in the inventory attached hereto in a fair and tenantable manner and to make good from time to time such breakages or defacements which may occur to those items. All electrical units including oil heater/wood heator the Tenant shall at all times keep in a serviceable condition and attend to such servicing as may be necessary and arrange annual cleaning of chimneys if same are regularly used. To regularly each week place garbage bins in appropriate position as required by Hobart City Council for collection purposes.

5. The Tenant agrees not to sub-let or assign over nor in any way dispose of, share, or part with possession of the premises or any part thereof to any person whomsoever without the consent in writing of the Landlord or his agent.

6. The Tenant shall not erect or inscribe on or affix to the premises or permit to be placed thereon any hoarding, writing, sign or other similar matter.

7. The Tenant agrees to use the premises only as a dwelling and only as such for those persons hereinafter described, without the consent in writing of the Landlord or his agent first being obtained for any additional persons.

(a) The Tenant hereby nominates that pursuant to clause 7 herein the following are those persons normally having cause to reside at the premises herein described.....

8. The Tenant hereby agrees that he will not make nor suffer to be made any alteration to the premises or any part thereof without the consent in writing of the Landlord and/or his agent first had and obtained and that he will not create any nuisance nor do any act thereon which shall be an annoyance to the Landlord or to the occupier or owner of any adjoining premises nor do nor suffer to be done anything that might prejudice any policy or policies of insurance on the premises or any part thereof.

9. The Landlord and/or his agent or workman may independently enter the said premises at all reasonable times during the tenancy for the purpose of viewing the condition thereof and to do such work as may be required by the Landlord or his agent.

10. If the Tenant shall commit a breach of or fail to observe and/or perform any of the conditions or agreements contained or implied in this agreement or fail to pay the rent herein reserved as herein provided whether formally demanded or not and notwithstanding the waiver of any previous breach, the Landlord and/or his agent may re-enter upon the premises or any part thereof (and for such purpose may break open any inner or outer door or windows without hereby becoming liable for damage trespass or otherwise) and expel and remove all persons therefrom and the tenancy hereby created shall thereupon absolutely determine, and this agreement may be produced by the Landlord or his agent as a notice to quit duly given and expired.

11. If the premises shall be destroyed or rendered unfit for habitation by fire or from any cause other than through the negligence of the Tenant so as to prevent the proper and beneficial enjoyment thereof either party shall have the right to determine the tenancy by delivering a notice to that effect to the other party and the tenancy hereby created shall immediately after the delivery of such notice cease and be determined and become void and of no effect save as to any rent or other monies due by the Tenant to the Landlord or the Landlord to the Tenant at the date of the said determination.

12. It is hereby agreed and DECLARED that no overholding of the premises by the Tenant beyond the term hereby created shall be construed as creating a tenancy from year to year, but that notwithstanding the failure of the Tenant to vacate upon the expiration of the said term, or of the Landlord to require possession at such expiration or the payment and receipt of rent by the Tenant and the Landlord respectively, the Tenants occupancy of the premises after the expiration of the said term may be determined by the Landlord at any time upon notice which may be given at any time.

13. The Tenant hereby covenants to pay the amount of $ on the signing hereof to Messrs. CRISP, MORRISBY REAL ESTATE who shall act as stakeholder same representing ~~a security~~ bond which shall be refunded to the Tenant in full upon vacation of the premises PROVIDED ALWAYS that the premises are in satisfactory condition which same will be determined after inspection by the Landlord and/or his agent.

14. Notwithstanding the provisions of Clause 1 hereof the Landlord or his agent may at an ytime during the term hereby created or any extension thereof give twenty eight days notice in writing to the Tenant of a variation in the amount of rental payable and such rental shall apply from the expiration of such notice. Upon receipt of any such notice the Tenant shall have the right upon giving a minimum of fourteen (14) days notice in writing to the Landlord or his agent so to do to terminate this tenancy and vacate the premises Provided Always that such notice is given not later than fourteen (14) days from the date of receipt of the notice of variation hereinbefore mentioned.

15. The Tenant hereby acknowledges receipt and knowledge of "Conditions of Tenancy Schedule" attached hereto which same constitutes an Addendum to the lease herein.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year hereinbefore written

SIGNED BY THE LANDLORD

"CONDITIONS OF TENANCY SCHEDULE" being addendum to lease dated .... between

S.M.C. (Landlord) and

..... (Tenant) of

property situated ..... Flat 3/ 64 Derwentwater Avenue, Sandy Bay.

Dear Sir/Madam,

We welcome you to your new address and trust that your residence here will be a happy and enjoyable one. Should any problems occur, such as electricity or plumbing etc., contact our Property Management Department immediately and ensure that your report is taken in writing.

In order to ensure a FULL REFUND of your BOND, upon the termination of your tenancy, we list below a number of the matters which will require your attention, having regard to the condition of the premises when your tenancy commenced.

1. Floors to be polished and/or carpets clean.
2. Marks to be removed from all walls.
3. Stove to be thoroughly cleaned, at back, sides, front top and inside.
4. Venetian blinds to be cleaned.
5. Windows and doors to be cleaned internally and externally.
6. Sink, bath, shower recess and toilet to be cleaned.
7. Defrost and clean the refrigerator, power off and door left open.
8. General cleanliness of premises is expected, subject to normal wear and tear.

Where it is the tenants responsibility to maintain the lawns and gardens, you should ensure that they are left in the same condition as when your tenancy commenced.

We wish to point out that BONDS are not refunded until vacant possession is given

AND

(a) An inspection of the condition of the premises is arranged with the Property Manager at least two weeks prior to vacation same to take place upon day of vacation or as close thereafter as practicable.

(b) ALL KEYS to the property are returned to this office.

(c) ALL rent has been paid in full to the date of vacation, or return of keys, whichever the latter.

Not withstanding (c) above, tenants are reminded that their lease is a legal document equally binding on both landlord and tenant, particularly as to the term of time of same, and should it be necessary to request an earlier vacation and such request be granted, then a fee of one weeks rent is required in addition to rental paid up until date your premises are relet by this office. The Landlord has legal recourse for any rental not paid as above. Should occupancy continue beyond the terminal date of the lease at least two weeks notice of intention to vacate must be given in writing.

CRISP, MORRISBY REAL ESTATE

Property Management Department.

Receipt of Copy Hereof is hereby acknowledged.

..... (Tenant)

TENANCY AGREEMENT

Location: Blackmans Bay.

Street: 2 and 4 Blanche Avenue.

Full Name of Tenants:

AN AGREEMENT made the day of

BETWEEN _____ of 32 Phoenix Street, Howrah (hereinafter called "the Landlord") of the one part and _____ of Blackmans Bay (hereinafter called "the Tenant") of the other part WHEREBY the Landlord agrees to let and the Tenant agrees to take ALL THAT the dwelling-house and land above described (hereinafter called "the premises") with the chattels now therein specified in the Schedule hereto (hereinafter called "the said chattels") upon the following terms and conditions:-

1. The tenancy shall commence on the day of May 1977 and shall be for a period of twelve months determinable by three months' notice in writing at any time by either party. If the Tenant vacates the premises without giving proper notice one month's rent will be payable in lieu thereof.

2. The rent payable shall be the sum of Fifty dollars ($50.00) per week such payments to be made on the Wednesday of each week by post to the post office box of the Landlord or to his duly authorised agent. In the event of the tenancy commencing or being determined by the Landlord during the currency of any week rent payable shall be apportioned and be payable accordingly.

3. The Tenant hereby agrees with the Landlord as follows:-

   (a) To pay the rent hereby reserved at the times and in manner aforesaid.

   (b) To keep all buildings fences and gates on the premises in as good repair as they are at the present time (reasonable wear and tear and damage by fire excepted) and in particular but without restricting in any way the generality of this Agreement:-

      (i) To keep the interior of the house and buildings clean and in good and tenantable repair and condition with glass all whole throughout.

.../2

(ii) To replace all keys lost or broken and all electric light globes broken, damaged or destroyed.

(iii) To keep the house and buildings free from vermin mice, rats and other pests.

(iv) To maintain in a tidy, neat and clean condition all paths and the yard and lawn areas about the premises.

(v) To keep clean all windows, lavatory fittings and chimneys.

(vi) To give immediate notice in writing to the Landlord of any damage to the house and buildings.

(vii) To remedy any stoppage or defect in the water service drains or sanitary service.

(viii) To keep clear from buildings and fences all grass, weeds and rubbish that may constitute a fire risk or hazard.

(ix) To keep properly maintained and repaired all electrical, gas and oil heating installations including range, fridge, power and light points and hot water service.

(x) To replace all general fittings broken, damaged or destroyed.

(c) Not without the prior consent in writing of the Landlord to use or permit the premises to be used other than as a private residence for four people.

(d) To permit the Landlord, his agents, servants, workmen and others with his authority to enter at all reasonable times to view the condition of the said chattels and the premises and to execute repairs or to make alterations and additions.

(e) At his own expense to repair and make good all defects and want of repair either of the premises or of the said chattels of which notice in writing shall be given by the Landlord to the Tenant within one calendar month after giving of such notice or the leaving thereof upon the premises.

(f) At the expiration or other determination of the tenancy hereby created to yield up the premises in such a state of repair and conditions as shall be in compliance with the Tenant's agreement herein contained (reasonable wear and tear and damage by fire as aforesaid expected).

.../3

4. The Tenant in lieu of the payment of a bond will provide to the Landlord four days of manual labour (8.00 a.m. to 5.00 p.m.) such days to be as agreed between them and to be spent in carrying out improvements to the premises and surrounds.

THE SCHEDULE HEREINBEFORE REFERRED TO

All that property situate at and known as 2 and 4 Blanche Avenue, Blackmans Bay.

IN WITNESS whereof the parties hereto have hereunto set their hands the day and year first hereinbefore written.

SIGNED by ROBERT HAROLD ANNELLS)
)
)
In the presence of -)
)
)
)
)

_____ _____
Witness

SIGNED by the said)
PHILIP MAXWELL YATES)
)
)
In the presence of -)
)
)
)
)

_____ _____
Witness

SCHEDULE OF CHATTELS REFERRED TO IN LEASE AGREEMENT

FIRST BEDROOM:

Blind, light fitting.

LOUNGE AND SUNROOM:

Two light fittings, carpets (brown and green)

KITCHEN AND DINNETTE:

Two light fittings, lino, Simpson electric stove, one fridge, Vulcan oil heater, telephone.

SECOND BEDROOM:

One light fitting, floor mat.

BATHROOM:

Light fitting, mirror, shower curtains and rail, cupboard, lino.

Signed by:

Tenant _____

Date ..../..../....

Landlord _____

Date ..../..../....

AN AGREEMENT made this day of 19 2 1

BETWEEN : ("the Landlord")

and ("the Tenant")

which expression shall where the context requires include his executors administrators or assigns.

OPERATIVE PART:

1. DEMISE

The Landlord agrees to let and the Tenant agrees to take being part of the property (called "the property") situate at and known as and together with the fittings fixtures furniture effects and things set forth in the Schedule and together with the right to use in common with all other tenants the outbuildings appurtenances hereditaments curtilage gardens of the property (called "the premises") for a term of calendar months commencing on the day of 198

2. RENTAL

The rental for the premises for the term of the lease shall be $ per week payable in advance to

3. TENANTS OBLIGATIONS

The Tenants agrees with the Landlord:

(a) To pay the rent at the time and in the manner provided for in clause 2.

(b) To reimburse the Landlord for all stamp duty levied at any time on this Lease.

(c) To pay his rateable share or proportion of all charges in respect of gas electric light, and power, telephone calls, rental and installation, and all charges for excess water used on the property and to indemnify the Landlord against all such charges.

(d) To use the premises only as a residence for the persons named as Tenant and their family, the total number of persons in any event not to exceed persons and for no other persons without the prior written consent of the Landlord.

(e) To use the premises as a residence and for no other purpose.

(f) To permit the Landlord his agents workmen or prospective purchasers or tenants at all reasonable times to enter upon the premises and to inspect the condition.

(g) To keep the interior and exterior, and the doors, windows; frames, internal pipes, Landlord's fixtures and fittings including doors, locks, bells, drains, sinks, toilets, chimneys, and the grounds surrounding the premises clean and free from obstruction and in good substantial repair and condition and to deliver up possession of the premises in such condition at the end of the tenancy (fair wear and tear excepted).

(h) To make good, clean, restore, repair, or replace in accordance with any notice in writing given by the Landlord to the Tenant (or if so requested by the Landlord to pay for) any fixture or fitting, which is not in good repair or is lost during the term (fair wear and tear excepted).

(i) Not to remove any of the fixtures or fittings except for the purpose of repair and then only after the written consent of the Landlord has been given.

(j) Not to damage or injure the property or drive nails, screws or other objects into fixtures and fittings, or into the walls or other parts of the property.

(k) Not to erect or make or permit to be erected or made any alterations in or additions to the construction or arrangement of the property without the prior written consent of the Landlord.

(l) Not to affix any exterior awnings or other fittings whatsoever without the prior written consent of the Landlord.

(m) Not to affix or exhibit, or permit to be affixed to, or exhibited upon any part of the property any placard, post, sign, board or advertisement.

(n) To supply a garbage can with a tight fitting lid of a type approved by the Local Council and put all rubbish and refuse in such can which shall be regularly placed in the position required by the collectors on the days set aside for garbage collection and not put any rubbish or refuse in any cardboard carton or the like nor store any garbage or refuse within the premises.

(o) Not to permit any clothes or other articles to hand from or be placed on the outside of or elsewhere on the property other than upon the clothes drying facilities provided on the property.

(p) Not to do upon the property or suffer or permit to be done upon the premises anything which in the opinion of the Landlord may be or become a nuisance or annoyance to, or in any way interfere with the quiet or comfort of the Landlord or owners or occupiers of adjacent premises.

(q) Not to use on the property any kerosene heater or other appliance which the Landlord has notified to the Tenant as a prohibited appliance.

(r) Not to store or permit to be stored any inflamable liquids or other dangerous substances in excess of that allowed by the insurer of the Landlord.

(s) Not to do or permit to be done or suffer to be done anything whereby a policy or policies of insurance on the property or the fixtures or fittings against damage by fire or otherwise may become void or voidable or whereby the rate or premium may be increased.

(t) Not to assign sub-lease or part with possession of the premises or any part of them without the consent in writing of the Landlord.

(u) Not to keep or permit to be kept on the property or on the land surrounding the property any animal or bird without the prior written consent of the Landlord.

(v) To yield up the premises properly cleaned with all the Landlord's fixtures and fittings in good and substantial repair and condition (fair wear and tear excepted) at the expiration or sooner determination of the lease.

(w) To compensate the Landlord for all costs charges expenses or damages occasioned to any part of the property, and the fixtures and fittings by reason of the negligent use or misuse of the premises including any act or omission in contravention of this Agreement by the Tenant or any person in or upon the property as licensee or invitee of the Tenant or in or upon the property with the consent of the Tenant.

(x) To maintain in good order and condition that part (if any) of the property which has been established by the Landlord as a garden.

(y) Not to park or suffer or permit to be parked any vehicle including motor cycles on any part of the property that is not sealed with asphalt concrete or similar material and designed for the access or parking of vehicles.

(z) Not to perform mechanical repairs or maintenance to any vehicle including motor cycles on the property.

(za) To use the premises in such a manner as not to unreasonably interfere with the rights of any other Tenants of the property.

(zb) Not to erect any television antenna on the property without the prior approval of the Landlord and to pay the cost of or make good at the option of the Landlord any damage caused by such erection.

(zc) To obey and conform with any house rules made by the Landlord pursuant to clause 8.2 hereof.

4. THE LANDLORD AGREES WITH THE TENANT

(a) That while the Tenant pays the rent at the times and in the manner provided for in clause 2 and observes and performs all the agreements stipulations and conditions contained in this Lease the Tenant may quietly enjoy the premises granted under this Lease, during the term of the Lease without disturbance by the Landlord or any person lawfully claiming through under or in trust for the Landlord.

(b) To indemnify the Tenant against liability for all rates and land tax.

5. IT IS AGREED:-

(a) In the event that:-

(i) the rent (or any part of it) due under this Lease has not been paid for seven (7) days after becoming payable (whether any formal or legal demand has been made or not) ; or

(ii) The Tenant for the time being has at any time failed or neglected to perform or observe any of the agreements, stipulations or conditions contained in this lease, or has suffered any execution to be levied against goods or property on the premises or has committed any act of bankruptcy, or has entered into any composition with this creditors ; or

(iii) the premises have been left vacant or unoccupied for more than fourteen (14) days without the prior written consent of the Landlord,

then, and in any such case, it shall be lawful for the Landlord or any person or persons duly authorised by the Landlord to re-enter into and upon the premises or any part of them in the name of the Landlord and to expel and remove all persons from the premises and to remove and store any personalty at the expense and risk of the Tenant who shall indemnify the Landlord against any and all claims and liabilities whatsoever by whomsoever made arising out of the exercise of this right of re-entry expulsion and storage and upon re-entry taking place the tenancy shall absolutely determine but without prejudice to any right or action or remedy of the Landlord in respect of an antecedent breach of any of the agreements stipulations and conditions contained in this Lease.

(b) That if after the expiration of the term of this Lease or any extension of the term the Tenant remains in possession of the premises:-

(i) acceptance of rent by the Landlord shall under no circumstances be considered to constitute any other tenancy than a tenancy from week to week upon all the terms of this Lease applicable to a weekly tenancy, notwithstanding that rent is accepted by the Landlord on a basis calculated from a longer period; and

(ii) the weekly tenancy thus created shall be capable of being brought to an end by either party giving to the other party seven (7) days notice in writing (commencing on any day of the year) of the intention to determine the weekly tenancy and upon the expiration of such notice the tenancy shall determine but without prejudice to the right of either party to recover compensation for any breach of agreement.

(c) That any notice to be given under this agreement shall be sufficiently given to the Tenant if signed by or on behalf of the Landlord and posted to the Tenant by post in an envelope addressed to the Tenant at the property and any notice shall be sufficiently given to the Landlord if addressed to the Landlord and left with or forwarded by post to the Landlord at the place where the Tenant usually pays rent to the Landlord.

(d) That any notice sent by post shall be deemed to be given to the party to whom it is addressed, at the time when in due course of post it would be delivered at the address to which it is directed.

(e) That the Tenant acknowledges that the property is in a clean and tidy condition and is in good order at the commencement of this Lease.

(f) That the Landlord shall not be liable for any injury or damage which may be sustained by the Tenant, or by any member of the household of the Tenant, or any licensee or invitee of the Tenant, or by the premises or the fixtures or fittings, or by any property of the Tenant by reason of any happenings not attributable to negligence (if any) of the Landlord.

(g) That if there is more than one Tenant the agreement on their part shall be deemed to have been entered into jointly and severally.

(h) That words importing the singular shall include the plural and words importing the plural shall include the singular and words importing the masculine gender shall include the feminine and/or a corporation.

(i) "the property" shall include "the premises" for the purpose of construction of the terms of this agreement.

6. SECURITY DEPOSIT

(a) The Tenant shall not take possession of the premises until the sum of has been been deposited with the Landlord as a security deposit.

(b) The Tenant acknowledges that the security deposit may be appropriated by the Landlord :

(i) towards making good any damage caused to the premises or the fixtures and fittings (other than fair wear and tear) during the term or any extension of the term or any period of holding over ;

(ii) as security for any rent remaining unpaid at the end of the term or any extension of the term or for any period of holding over ;

(iii) to cover the costs of cleaning the premises to the same standard as they are now acknowledged by the Tenant to be in unless otherwise stated in writing in this agreement and acknowledged by the Landlord and Tenant by their signatures.

(iv) as liquidated damages towards satisfaction of any claim for loss of rent arising in the event of premature termination of the Lease by the Tenant.

(c) To the extent that the security deposit is not used for the above purposes it shall be refunded in full to the Tenant within one (1) month of vacation of the premises by the Tenant.

7. EARLY DETERMINATION OF TENANCY

7.1 If the premises shall be destroyed or rendered unfit for habitation by any cause other than the negligence of the Tenant either party shall have the right to determine the tenancy by notice in writing and the tenancy shall cease and determine upon the giving of such notice without prejudice to the rights of either party with respect to any antecedent breach of this agreement.

7.2 In the event that a Tenant not being the spouse of a Tenant who is a member of the staff or a student at the University of Tasmania ceases to be a member of the staff or a student at the University of Tasmania the Landlord may notwithstanding any other provision in this agreement determine the tenancy by four (4) week's notice in writing to the Tenant.

8. SPECIAL PROVISIONS

8.1 Any personalty which remains upon the premises after the termination of the term hereof or any extended term or any period of holding over or which is stored by the Landlord pursuant to clause 5 hereof for a period of fourteen (14) days shall become the property of the Landlord who shall not be bound to account for it to the Tenant.

8.2 The Landlord may make and post up from time to time house rules regulating the exercise of the right of the Tenant to use the premises.

SCHEDULE

List of Fixtures and Fittings

(The Tenant acknowledges the good
(repair of the fixtures and fittings
(except where expressly noted in
(writing not to be in good condition.

SIGNED on behalf of the Landlord)

in the presence of:)

RESIDENTIAL TENANCIES AGREEMENT

This Agreement has been developed to provide a set of fair principles to be applied by both LANDLORD and TENANT in private residential tenancy agreements.

The Agreement recognises that both parties to a residential tenancy agreement have rights and obligations to each other, and aims to detail these in clear unambiguous form.

The Agreement is comprised of three parts:

Part I: The Residential Tenancy Agreement

Part II: Terms and Conditions of the Residential Tenancy Agreement

Part III: Premises Condition Report

Consumer Affairs Council

25 Davey Street, Hobart. 30 2662

24 Paterson Street, Launceston. 32 2219

Winton House
63 Best Street, Devonport. 24 8228

Osborne House
Wilmot Street, Burnie. 31 5022

OSD-1028

Government Printer, Tasmania

RESIDENTIAL TENANCY AGREEMENT

PART I

This Agreement in full accordance with the terms and conditions as expressed in Part II is made on this ..... day of .....19.....

at ..... in Tasmania

between ..... (LANDLORD)

(whose agent is .....)

and ..... (TENANT)

1. PREMISES
The LANDLORD lets to the TENANT the premises known as.....

.....

.....

together with those items listed in the Schedule.

2. RENT
The rent shall be $..... per.....commencing on the .....day of....., and payable in advance by the ..... day of ..... to the (LANDLORD/AGENT) at .....

3. SECURITY DEPOSIT
The amount of security deposit is $.....

4. SERVICES
(a) The TENANT is responsible to pay for the following:—

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....

(b) The LANDLORD is responsible to pay for the following:—

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....

RESIDENTIAL TENANCY AGREEMENT
CONTINUED ON PAGE 15

PART II

TERMS AND CONDITIONS OF THE RESIDENTIAL TENANCY AGREEMENT

1. RENT

1.1 The LANDLORD shall:

(a) Payment—

(i) provide a receipt to the TENANT for rent paid in cash (or on request if paid by cheque);

(ii) not require more than two week's rent in advance if the rent is payable weekly;

(iii) in any other case not require more than an amount which would be equivalent to four weeks rent in advance.

(b) Rent Increases—

(i) in the case of a six-months or longer tenancy, give the TENANT 60 days notice in writing of any increase in rent;

(ii) in the case of a tenancy less than six months but more than 7 days, give the TENANT 14 days notice in writing of any increase in rent;

(iii) in the case of a weekly tenancy agreement, give the TENANT 7 days notice in writing of any increase in rent.

1.2 The TENANT shall:

(a) Payment—

(i) pay the rent at an agreed interval at the place specified in the tenancy agreement;

(ii) not refuse to pay rent on the grounds that the security deposit/bond money may be used as rent (i.e. at the termination of the lease agreement).

2. SECURITY DEPOSIT/BOND MONEY

2.1 *(a)* Maximum Level—

(i) a security deposit/bond money shall not exceed an amount equivalent to four week's rent.

2.1 *(b)* Holding—

(i) the LANDLORD shall pay the security deposit/bond money into a separate interest bearing account within five working days of accepting a security deposit. Any interest accrued is payable to the TENANT.

2.3 *(a)* Return—

(i) the security deposit/bond money together with the accrued interest is to be returned to the TENANT within 14 days after the termination of the tenancy, unless the LANDLORD is entitled to withhold all or part of the amount, as specified in sub paragraph (ii) below;

(ii) the LANDLORD may withold all or part of the security deposit/bond money in order to:

(a) satisfy any loss resulting from—

- damage caused by the TENANT to the premises which form part of the tenancy;
- loss of goods, the property of the LANDLORD by the TENANT;
- failure by the TENANT to keep the premises clean;
- the premises being abandoned by the TENANT; or
- any unpaid debts upon the rental property incurred by the TENANT.

(b) if agreed to by the TENANT for any other reason.

3. CONDITION REPORT

3.1 Where the TENANT is required to pay a security deposit/bond money the LANDLORD shall prepare a 'Premises Condition Report' of the premises at the commencement of the tenancy as per Part III of this Agreement. The 'Premises Condition Report', signed by both parties, shall be given to the TENANT within two days of the tenant occupying the premises. A second copy shall be retained by the LANDLORD.

3.2 At the time of entering into the tenancy agreement, the Premises Condition Report shall be checked by both the LANDLORD and the TENANT, making notations of the condition of the premises as detailed in the Report.

(a) The Premises Condition Report is to be checked at the termination of the tenancy agreement by both the LANDLORD and TENANT and the condition of the fixtures and fittings etc. noted.

3.4 The completed Premises Condition Report, signed by both parties, shall serve as a basis for determining whether all or part of the security deposit/bond money shall be withheld for damage caused by the TENANT as per paragraph 2.3 *(a)* (ii) *(a)* above.

4. USE OF PREMISES

4.1 The LANDLORD shall:

(a) make sure that on the day on which it is agreed that the TENANT is to move in, the premises are vacant; and

(b) ensure that the TENANT has quiet enjoyment of the premises (i.e. the LANDLORD shall not interfere with the tenant's use of the premises, except when exercising his rights of entry as per clause 8).

4.2 The TENANT shall not:

(a) use the premises or permit them to be used for any illegal purpose; or

(b) do anything on the premises, or permit someone else entering the premises with the TENANT'S permission, to do anything which causes a nuisance.

(c) keep animals on the premises except with the express permission of the LANDLORD, being recorded in the agreement;

(d) carry on any trade business manufacturing or other activity which alters the residential use of the premises.

5. LOCKS

5.1 The LANDLORD shall:

(a) provide locks or otherwise secure all external doors and windows of the premises;

(b) give the TENANT the necessary keys immediately on occupancy or after changing locks; and

(c) not change any locks with the intention of 'locking out' the TENANT, except as may be necessary in accordance with section 9—'Termination of the Agreement' below.

5.2 The TENANT shall:

(a) not change any lock without the LANDLORD'S permission;

(b) give the LANDLORD a key immediately after changing any lock; and

(c) return all keys to the LANDLORD on the expiration or determination of the tenancy.

6. CLEANLINESS, REPAIRS, MAINTENANCE

6.1 The LANDLORD shall:

(a) make sure that the premises are in a reasonably clean condition at the beginning of the tenancy agreement;

(b) maintain the premises in good repair; and

(c) upon notification from the TENANT, undertake any general repairs within 14 days of notification.

6.2 The TENANT shall:

(a) keep the premises in a reasonably clean condition;

(b) take care to avoid damaging the premises;

(c) notify in writing, the LANDLORD or his AGENT of any general repairs which are required within 7 days of that need having arisen; and

(d) have the right to make 'urgent repairs' to the premises if, after taking reasonable steps to contact the LANDLORD, the TENANT is unable to make suitable arrangements with the LANDLORD or his AGENT to make such repairs, and shall be recompensed by the LANDLORD the reasonable cost of this repair.

('Urgent repairs' means any work necessary to repair—

(i) any burst water service;

(ii) any sewerage blockage;

(iii) any broken sewerage fittings;

(iv) any serious roof leak;

(v) any electrical fault likely to cause damage to property or endanger human life;

(vi) any gas leak;

(vii) any flooding; or

(viii) any substantial damage caused by flooding, storm or fire, or other natural event.)

7. RENOVATIONS, ALTERATIONS

7.1 The TENANT shall:

(a) not renovate or make any alterations or additions to the premises without the LANDLORD'S permission in writing;

(b) not install any fixture or fitting without the LANDLORD'S permission in writing; and

(c) restore the premises to their original condition at the end of the agreement if the TENANT has renovated, altered or added to them in any way. Alternatively, the TENANT may pay the LANDLORD the cost of the restoration work. This condition shall not apply if the LANDLORD agrees in writing to excuse the TENANT from such restoration work.

8. RIGHT OF ENTRY

8.1 The LANDLORD:

(a) may not enter the premises before 8.00 a.m. or after 6.00 p.m. except in an emergency. or with the TENANT'S express permission;

(b) may enter the premises after 8.00 a.m. and before 6.00 p.m. after giving reasonable notice of intention to enter;

(i) to show the premises to prospective tenants, buyers or financiers;

(ii) to carry out his duties under the tenancy agreement (e.g. to undertake repairs);

(iii) if it is reasonably believed that the TENANT has:

- used the premises for an illegal purpose;
- caused a nuisance;
- failed to keep the premises in a reasonably clean condition: or
- caused damage to the premises.

(iv) for any other reason but only once in any tenancy of less than three months and not more than once in any three month period in a tenancy of longer than three months.

9. TERMINATION OF THE TENANCY AGREEMENT

9.1 In general, a fixed term agreement may not be terminated until the end of the term, unless by agreement between the parties.

9.2 Under certain conditions, as detailed below, either the LANDLORD or the TENANT may terminate the agreement.

9.3 The LANDLORD may give the TENANT notice to vacate the premises in the following circumstances:

(a) Immediate notice—

(i) if the premises have been totally destroyed or damaged to such an extent as to be unsafe, or are unfit for human habitation;

(ii) if the TENANT causes malicious damage to the premises or endangers the safety of the premises; or

(iii) if the TENANT is in arrears of rent of 15 days or more.

(b) Where the period of the agreement exceeds 14 days, 60 days or 6 months respectively—

(i) 14 days notice—
if the TENANT does not comply with the tenancy agreement.

(ii) 60 days notice—
if the LANDLORD requires possession of the premises for the purposes of demolition; substantial repairs, renovation or reconstruction which cannot be carried out practicably without vacant possession; for his own occupation or for a member of his immediate family; or, for sale.

(iii) Six months notice—
in any other case, the LANDLORD may terminate the tenancy without giving a reason.

9.4 The TENANT may give the LANDLORD notice of intention to vacate the premises as follows:

(a) Immediate notice—

(i) if the premises have been totally destroyed or damaged to an extent as to be unsafe or unfit for human habitation.

(b) Where the period of the agreement exceeds 14 days or 60 days respectively—

(i) 14 days notice—
if the LANDLORD does not comply with the tenancy agreement.

(ii) 60 days notice—
if the TENANT wishes to bring an agreement to an end for any other reason.

10. MISCELLANEOUS

10.1 XXXX

PART III

PREMISES' CONDITION REPORT

Room	Condition at Commencement of Tenancy.....(Date)	Condition at Termination of Tenancy.....(Date)
OM:		
lls, Ceilings		
ors, Windows		
nds, Curtains		
ht Fittings, Power points		
or, Floor Coverings		
ner:		
rniture:		
OM:		
lls, Ceilings		
ors, Windows		
nds, Curtains		
ht Fittings, Power points		
or, Floor Coverings		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
Other:		
Furniture:		
ROOM:		
Walls, Ceilings		
Doors, Windows		
Blinds, Curtains		
Light Fittings, Power points		
Floor, Floor Coverings		
Other:		
Furniture:		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
OM:		
lls, Ceilings		
ors, Windows		
nds, Curtains		
ht Fittings, Power points		
or, Floor Coverings		
ner:		
rniture:		
OM:		
ls, Ceilings		
rs, Windows		
ds, Curtains		
t Fittings, Power points		
r, Floor Coverings		
r:		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
niture:		
OM:		
ls, Ceilings		
rs, Windows		
ds, Curtains		
nt Fittings, Power points		
or, Floor Coverings		
er:		
niture:		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
ROOM: KITCHEN		
Walls, Ceilings		
Window Screens		
Blinds, Curtains		
Light Fittings, Power points		
Floor, Floor Coverings		
Benches, Cupboards		
Stove, Hot Plates		
Refrigerator, Freezer		
Sinks, Taps, Drawers		
Other:		
Furniture:		
ROOM: BATHROOM		
Walls, Ceilings		
Doors, Windows		
Blinds, Curtains		
Light Fittings, Power points		
Floor, Floor Coverings		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
ity Unit, Cupboards		
ors, Shower Screens		
, Shower		
n, Taps, Drawers		
ilators		
er:		
ire:		
OM: TOILET		
ls, Ceilings		
rs, Windows		
ds, Curtains		
t Fittings, Power points		
r, Floor Coverings		
et Bowl, Cistern		
, Taps, Drains		
tilators		
er:		
OM: LAUNDRY		
ls, Ceilings		
rs, Windows		
ds, Curtains		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
Light Fittings, Power points		
Floor, Floor Coverings		
Benches, Cupboards		
Sinks, Taps		
Washing Machine, Dryer		
Other:		
Furniture:		
MISCELLANEOUS:		
Storeroom		
Verandah, Porch		
Carport, Garage		
Fences, Gates		
Lawns, Gardens		
Exterior:		
Walls		
Doors		
Stairs		
Paths		
Patios		

Room	Condition at Commencement of Tenancy	Condition at Termination of Tenancy
erior:		
tairs		
Hot Water Systems		
Locks, Catches		
Other:		

....

Landlord/Agent (Date) Landlord/Agent (Date)

....

Tenant (Date) Tenant (Date)

5. PERIOD OF AGREEMENT

The period of the Agreement is ..... commencing on the ..... day of .....19.....

and terminating on the ..... day of ..... 19.....

6. TERMS AND CONDITIONS

The terms and conditions of the Agreement are those expressed in PART II of this Residential Tenancy Agreement together with the following additional terms and conditions:

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7. SCHEDULE OF ITEMS AS PER CLAUSE 1

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.....

.....

.....

Signature of LANDLORD .....

Signature of WITNESS .....

Signature of TENANT .....

Signature of WITNESS .....

APPENDIX 3

(1) Tenants Unions Statistics for the 1985-88 Financial Year.

(2) Selected Case Studies - Commonly Presented Problems

APPENDIX 3

TENANCY ADVICE SERVICE STATISTICS

MAY 1985 - MARCH 1986

CATEGORY	APRIL	MAY	JUNE	JULY	AUG.	SEP.	OCT.	NOV	DEC.	JAN.	FEB.	MAR.	APR.	TOTAL	% BREAKDOWN
WITHELD BOND	41	24	20	24	13	18	13	17	7	–	5	4	12	198	17.73%
PRIVACY	8	6	11	9	5	2	4	7	3	–	3	1	3	62	5.55%
REPAIRS	5	8	9	10	7	4	4	7	–	–	2	4	3	63	5.64%
AGREEMENTS	6	–	12	9	7	5	7	13	4	–	4	9	7	83	7.43%
EVICTIONS	19	21	11	19	12	10	15	11	2	–	6	4	4	134	12.00%
RENT INCREASE	5	5	7	12	6	7	10	7	2	–	1	3	1	66	5.90%
RENT	–	–	–	–	–	–	–	6	3	–	1	2	3	15	1.34%
SUB-STANDARD	6	18	5	3	–	–	1	–	–	–	–	2	3	38	3.40%
LANDLORD ENQUIRIES	1	5	7	4	6	6	9	4	4	–	2	7	5	60	5.37%
FINANCIAL		–	5	5	2	3	2	1	–	–	1	1	12	22	1.97%
INTER-TEN DISPUTE	3	–	3	–	1	3	2	6	1	–	3	2	1	25	2.24%
GENERAL	20	30	26	25	26	20	21	10	11	–	1	8	3	201	18.00%
ACCOMO-DATION	9	8	8	14	5	5	5	3	1	–	1	1	–	60	5.37%
DISCRIM-INTION	1	–	–	1	–	–	–	–	–	–	1	–	–	3	0.27%
MISC.	14	20	–	–	17	11	1	5	–	–	4	6	9	87	7.79%
TOTAL	194	151	127	122	107	85	94	97	–	–	53	54	56	1117	100%

APPENDIX 3

TENANCY ADVICE SERVICE STATISTICS

MARCH 1988 - FEBRUARY 1989

CATEGORY	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	TOTAL	%
WITHHELD BOND	13	11	12	10	14	11	11	6	11	9	16	9	133	12.4 %
PRIVACY	9	5	4	3	5	7	6	6	2	3	8	12	70	6.5 %
REPAIRS	9	7	8	4	3	11	11	10	7	4	5	6	85	7.9 %
AGREEMENTS	18	21	22	24	24	31	19	14	22	11	20	18	244	22.7 %
EVICTIONS	13	6	6	9	9	2	6	3	7	7	5	12	85	7.9 %
RENT INCREASE	5	1	3	2	3	4	0	3	4	0	1	0	26	2.4 %
RENT	5	3	2	4	2	1	0	6	4	3	4	3	37	3.4 %
SUB-STANDARD	8	1	6	3	7	2	4	7	6	2	3	4	53	4.9 %
LANDLORD ENQUIRY	4	6	1	6	9	9	6	8	19	8	11	8	95	8.8 %
FINANCIAL	2	1	3	0	5	1	0	0	1	1	5	1	20	1.9 %
INTER-TEN DISPUTE	2	3	0	3	1	3	1	1	4	1	5	2	26	2.4 %
GENERAL	16	4	4	4	3	9	5	5	12	3	7	4	76	7.1 %
ACCOMO-DATION	0	0	0	2	1	1	0	1	0	0	2	1	8	0.7 %
DISCRIMINATION	1	0	1	0	0	0	1	0	0	0	1	0	4	0.4 %
HARASSMENT	1	3	0	3	2	1	3	1	0	0	1	2	17	1.6 %
HOUSING DEPT.	0	2	6	2	2	1	1	5	2	0	0	1	22	2.0 %
OTHER	3	3	4	11	8	10	6	4	8	3	8	8	76	7.1 %
TOTAL QUERIES	109	77	82	90	98	104	80	80	109	55	102	91	1077	
TOTAL CLIENTS	102	70	74	80	90	102	78	79	107	55	92	86	1015	

APPENDIX 3

Tenancy Advice Service Statistics (May 1987 - April 1988)

CATEGORY	MAY	JUNE	JULY	AUG.	SEP.	OCT.	NOV	DEC.	JAN.	FEB.	MAR.	APR.	TOTAL	% BREAKDOWN
WITHELD BOND	21	12	13	17	12	15	13	7	10	14	13	11	158	14.3%
PRIVACY	6	8	5	3	7	4	8	4	2	7	9	5	68	6.1%
REPAIRS	5	9	13	10	11	8	13	5	5	8	9	7	103	9.3%
AGREEMENTS	23	10	19	28	25	7	28	14	6	19	18	21	218	19.7%
EVICTIONS	10	8	3	6	5	8	20	5	12	9	13	6	105	9.5%
RENT INCREASE	4	3	1	1	1	-	2	4	3	1	5	1	26	2.3%
RENT	8	4	5	9	5	2	2	3	2	5	5	3	53	4.8%
SUB-STANDARD	1	3	3	-	1	1	5	1	1	6	8	1	31	2.8%
LANDLORD ENQUIRIES	3	10	7	3	7	8	5	4	4	4	4	6	65	5.9%
FINANCIAL	3	3	2	-	2	-	1	-	-	-	2	1	14	1.3%
INTER-TEN1 DISPUTE		3	4	2	5	3	5	6	2	2	2	3	38	3.4%
GENERAL	9	14	14	8	16	12	8	3	5	10	16	4	119	10.7%
ACCOMO-DATION	3	2	1	2	2	-	1	1	-	-	-	-	12	1.1%
DISCRIM INATION	-	-	-	2	-	-	-	-	-	-	1	-	3	0.3%
HARASSMENT	-	1	2	-	3	2	1	-	3	1	1	3	17	1.5%
HOUSING DEPT.	1	3	1	-	1	-	2	1	1	-	-	2	10	0.9%
MISC. QUERIES	11	4	2	5	6	4	8	10	6	4	3	3	66	6.0%
TOTAL QUERIES	109	97	95	9	109	74	122	68	62	90	109	77	1107	
TOTAL NO OF CLIENTS	83	97	85	87	107	74	106	58	60	82	102	70	1011	

NOTE: The office closed on 18 December 1987 and reopened on 12 January, 1988. Our 1987/88 opening hours have been 9.30am - 2.00pm, Tuesday to Friday. i.e. 18 hours per week. week.

APPENDIX 3

TENANCY ADVICE SERVICE STATISTICS

MAY 1986 - APRIL 1987

CATEGORY	MAY	JUNE	JULY	AUG.	SEP.	OCT.	NOV	DEC.	JAN.	FEB.	MAR.	APR.	TOTAL	% BREAKDOWN
WITHELD BOND	11	8	14	11	12	11	18	15	12	13	12	14	151	15.3%
PRIVACY	1	4	8	4	6	7	7	2	2	3	8	5	57	5.8%
REPAIRS	5	6	9	10	5	3	3	8	5	9	8	8	79	8%
AGREEMENTS	7	12	15	18	16	17	19	9	7	18	14	7	159	16.1%
EVICTIONS	12	7	6	10	7	9	10	5	6	12	11	5	100	10%
RENT INCREASE	4	2	6	5	1	3	3	2	3	3	2	4	38	3.8%
RENT	2	2	3	6	2	13	10	4	1	4	2	7	56	5.7%
SUB-STANDARD	1	1	7	2	3	2	4	1	0	2	1	0	24	2.4%
LANDLORD ENQUIRIES	3	1	3	2	4	4	3	3	12	6	5	4	50	5.1%
FINANCIAL	1	6	2	3	0	0	2	1	0	1	5	3	24	2.4%
INTER-TEN DISPUTE	4	2	0	1	5	2	2	2	2	5	4	1	30	3%
GENERAL	8	7	6	9	5	6	10	9	4	10	13	9	96	9.7%
ACCOMO-DATION	2	1	4	3	3	-	2	-	3	2	3	-	23	2.3%
DISCRIM INATION	-	-	-	1	-	-	2	-	1	-	1	-	5	0.5%
HARASSMENT	-	-	-	-	-	-	-	-	-	1	1	1	3	0.3%
HOUSING DEPT.	-	-	-	-	-	-	-	-	1	4	1	2	8	0.8%
MISC.	6	3	7	4	13	5	4	7	3	6	7	10	75	7.6%
TOTAL	68	62	60	76	73	60	78	62	60	68	80	82	978	(queries)
													829	(individuals)

NOTE: The office closed on 22 December 1986 and reopened on 13 January, 1987. Opening hours for 1986 were 9am to 1pm; Mon, Wed, Friday; i.e. 12 hours per week. For 1987 opening hours are 9.30am to 2.30pm, Tuesday to Friday.

APPENDIX 3

CASE EXAMPLES FROM CURRENT ADVICE SERVICE FILES

CASE 1

Ms. C and Ms. Q were renting a large flat above the house of Mr. H (landlord). From the time they moved in, the young women were subjected to continual invasions of privacy and harrassment. They complained of the landlord walking in, without their consent and without knocking, at all times of the day and evening; sometimes interrupting them in the shower or bath.

The landlord also attempted to control aspects of the tenants' lives that were not his business; eg. he forbade them from having male visitors after a certain hour in the evening.

When the tenants objected to this treatment, the landlord retaliated by serving them with 3 days notice to quit.

The landlord was completely unresponsive to approaches by the Tenants Union; and the Union finally had to negotiate with the landlord's lawyer to win for the tenants a full week's notice to quit.

This case illustrates the current inadequacy of the law with regard to invasion of privacy and retaliatory eviction. The Tenants Union has noted, with some alarm, that owing to the lack of protection in these areas, single female tenants are particularly vulnerable to unwelcome advances and sexual harassment from unscrupulous landlords.

CASE 2.

Mr. W came to the Tenants Union complaining that his landlord was unfairly withholding $250 bond money. Investigations by the Union revealed that not only was the bond money being illegally withheld - for claimed breaches of the lease that did not occur - but that the tenant had paid $20 stamp duty on the lease which had then been pocketed by the landlord.

Further investigations revealed that this particular landlord, who owns a large block of flats, was in the habit of defrauding his tenants by charging them various amounts for stamp duty, legal fees etc., and then keeping the money.

The tenant was referred to a lawyer for recovery of the bond money (the Small Claims Tribunal was not operating at this time), and the fraudulent practice re. stamp duty was reported to the Commissioner for Stamp Duties.

The Tenants Union has an important role to play in exposing and campaigning against these kinds of illegal practices; which, in the current legal climate, are all too easy for landlords to indulge in.

APPENDIX 3

CASE EXAMPLES FROM CURRENT ADVICE SERVICE FILES

1) Ms B. (a single mother) signed a 12 month lease and paid a $500 bond with a real estate agent for a two bedroom flat costing $95 per week. After five months of tenancy Ms B realised that she could no longer afford the rent and sought to get out of the lease. Ms B did the work for the agent in showing prospective tenants through the flat and securing new tenants. She left the flat spotlessly clean with her rent fully paid up. The agent then refused to refund the bond on the grounds that the owners took pity on Ms B in giving her the flat and were annoyed when she broke the lease.

After extensive negotiations with the Real Estate Council (who admitted that the agent was acting unethically, but were not prepared to take any action) the Tenants Union was eventually able to secure a refund of the bond.

The Tenants Union believes that the activities of Real Estate Agents should be more closely monitored since illegal/unethical practises are not uncommon.

2) Mr J & Mr L (students) came to the Tenants Union with a lease they were planning on signing for a house in New Town. The lease had been drawn up by a local solicitor and was so heavily biased in favour of the landlord that it was quite detrimental to the interests of the tenants. In addition it was, in the opinion of our legal advisor 'badly drafted, contradictory and some clauses were unenforceable'.

We advised the prospective tenants not to sign the lease unless some of the clauses were re-negotiated. The Tenants Union also wrote to the solicitor concerned and to the Consumer Affairs Council on the matter.

The tenants did manage to re-negotiate some of the clauses, but the document they signed in the end was still, in our opiniion most unfair.

This case illustrates the need for a <u>mandatory</u> fair lease.

APPENDIX 4

(1) Tenants Union of Tasmania: Recommended Changes to the Consumer Affairs Council Lease. (Draft Residential Tenancies Agreement).

(2) Tenants Union of Tasmania: Notes on the Interpretation of the Residential Tenancies Agreement.

(3) Tenants Union of Tasmania: Amendments to the Court of Request (Small Claims Division) Act 1985 to Extend Jurisdiction to Enable the Commissioner to Determine Claims Arising out of Residential Tenancy Matters.

DRAFT RESIDENTIAL TENANCIES AGREEMENT

eceipts

1. THE RENT

1.1 The LANDLORD shall:

(i) provide a receipt for all monies received fron the TENANT

(ii) include in the receipt the following details:

(a) the TENANT'S name and address of premises;

(b) amount paid and the fact that it is rent;

(c) date of receipt of payment;

(d) the rental period for which the payment is made.

ent in advance

(iii) not require more than 2 weeks rent in advance except in the case of a monthly tenancy, where no more than 1 months rent may be required.

nt Increase

1.2 The LANDLORD shall:

xed term greements

(i) in the case of a fixed term agreement:

(a) not increase the rent more than once in any 6 month period of the tenancy;

(b) give at least 60 days notice in writing of any increase in rent.

eekly, ortnightly & onthly agreements

(ii) in the case of weekly, fortnightly or monthly agreement.

(a) not increase the rent more than once in any 6 month period of the tenancy;

(b) give at least one months notice in writing of any increase in rent.

ayment of rent y the tenant

1.3 The TENANT shall:

(i) pay the rent at the agreed interval at the place specified in Part 1 of this agreement;

(ii) not refuse to pay rent on the grounds that bond money may be used as rent, at the termination of the lease agreement.

2. BOND

aximum bond

2.1 The bond shall not exceed an amount equivalent to three weeks rent.

olding

2.2 The LANDLORD shall pay the bond money into a separate interest bearing account within 5 working days of accepting a security deposit.

eturn

2.3 (i) The bond together with the accumulated interest is to be returned to the TENANT within 14 days of the termination of the tenancy, unless the LANDLORD is entitled to withold all or part of the amount as specified below;

(ii) The LANDLORD may withold all or part of the bond in order to:

(a) satisfy any loss resulting from:

- damage caused by the TENANT to the premises which form part of the tenancy;
- loss of goods, the property of the LANDLORD by the TENANT;
- failure by the TENANT to keep the premises reasonably clean;
- the premises being abandoned by the TENANT;
- any unpaid debts upon the rental property incurred by the TENANT.

Statement of loss

(iii) Where the LANDLORD intends to withold all or part of the bond, s/he shall give to the TENANT within 14 days of the termination of the tenancy a statement in writing setting out the details of the loss as specified above and the costs of making good the loss.

3. CONDITION REPORT

Premises condition report

3.1 Where the TENANT is required to pay a bond the LANDLORD shall prepare a "Premises Condition Report" of the premises at the commencement of the tenancy as per Part III of this agreement. The Premises Condition Report, signed by both parties, shall be given to the TENANT within two days of the TENANT occupying the premises. A second copy shall be retained by the LANDLORD.

3.2 At the time of entering the tenancy agreement the "Premises Condition Report" shall be checked by both the LANDLORD and the TENANT, making notation of the condition of the premises as detailed in the report.

3.3 the Premises Condition Report is to be checked at the termination of the tenancy agreement by both the LANDLORD and the TENANT and the condition of the fixtures and fittings etc. noted.

3.4 the completed Premises Condition Report, signed by both parties, shall serve as a basis for determining whether all or part of the bond money shall be witheld for damage caused by the TENANT as per paragraph 2.3a(ii) above.

Use of Premises

4. USE OF PREMISES

4.1 The LANDLORD shall:

(a) make sure that on the day on which the TENANT is to move in, the premises are vacant; and

(b) ensure that the TENANT has quiet enjoyment of the premises (i.e. the LANDLORD shall not interfere with the TENANT'S use of the premises, except when exercising his rights of entry as per clause 8).

4.2 The TENANT shall not:

(a) use the premises or permit them to be used for any illegal purpose; or

(b) do anything on the premises, or permit someone else entering the premises with the TENANT'S permission, to do anything which causes a nuisance.

(c) keep animals on the premises except with the express permission of the LANDLORD, being recorded in the agreement

(d) carry on any trade, business, manufacturing of other activity which alters the residential use of the premises.

Changing the locks

5 LOCKS

5.1 The LANDLORD shall:

(a) provide locks or otherwise secure all external doors and windows of the premises;

(b) give the TENANT the necessary keys immediately on occupancy or after changing the locks;

(c) not change any lock with the intention of preventing the TENANT from using the premises except in the following circumstances:

(i) where the premises have been abandoned;

(ii) the premises have been vacated by the TENANT following termination;

(iii) following the lawful eviction of the TENANT.

Return of keys

5.2 The TENANT shall:

(a) not change any locks without the landlords permission;

(b) give the LANDLORD a key immediately after changing any lock; and

(c) return all keys to the LANDLORD on the expiration or determination of the tenancy.

6. CLEANLINESS, REPAIRS AND MAINTENANCE

Landlords duty to provide and maintain premises in good repair

6.1 The LANDLORD shall:

(a) make sure the premises are in a reasonably clean condition and in good repair at the commencement of the tenancy;

(b) maintain the premises in good repair; and

(c) upon notification from the TENANT, undertake any general repairs within 14 days of notification.

Tenants duty to notify needed repairs

6.2 TENANT shall:

(a) keep the premises in a reasonably clean condition;

(b) take care to avoid damaging the premises;

(c) notify in writing the LANDLORD or his/her AGENT of any general repairs which are required within 7 days of that need haven arisen; and

Urgent repairs

(d) have the right to make 'urgent repairs' to the premises if, after taking reasonable steps to contact the LANDLORD, the TENANT is unable to make suitable arangements with the LANDLORD or his/her AGENT to make such repairs, and shall be recompensed by the LANDLORD the reasonable cost of this repair, within 14 days of the giving of an invoice or account for such cost.

('Urgent repairs' means any work necessary to repair –

(i) a failure or breakdown of gas, electricity or water supply to the premises;

(ii) a failure of breakdown of any essential service or appliance on the premises for hotwater cooking, laundering or heating;

(iii) any sewerage blockage or broken sewerage fittings;

(iv) any serious roof leak;

(v) any flooding;

(vi) any substantial damage caused by flooding, storm, fire, or other natural event;

(vii) any fault or damage that makes the premises unsafe or insecure.)

7. RENOVATIONS AND ALTERATIONS

7.1 The TENANT shall:

(a) not renovate or make any alterations or additions to the premises without the LANDLORDS permission in writing;

(b) not install any fixture or fitting without the LANDLORDS permission in writing;

(c) restore the premises to their original condition at the end of the agreement if the TENANT has renovated, altered or added to them in any way. Alternatively, the TENANT may pay the LANDLORD the cost of the restoration work.

8. RIGHT OF ENTRY

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8.1 The LANDLORD:

(a) may not enter the premises before 8.00 a.m. or after 6.00p.m.except in an emergency, or with the TENANTS express permission;

(b) may enter the premises after 8.00 a.m. or after 6.00 p.m. after giving at least 24 hours notice of the intention to enter, or a lesser period with the tenants express permission;

(i) to show the premises to prospective tenants, buyers or financiers;

(ii) to inspect the need to make repairs;

(iii) to carry out repairs;

(iv) if it is reasonably believed that the TENANT has:

- used the premises for an illegal purpose;
- caused a nuisance;
- caused damage to the premises;

(v) for any other reason but only once in any tenancy of less than three months and not more than once in any three month period in a tenancy of longer than three months;

(vi) any notice of intention to enter given under 8.1 should state the purpose of the visit.

9. TERMINATION

ediate notice

9.1 In the case of any tenancy agreement (whether a fixed term agreement, or a monthly, fortnightly or weekly tenancy agreement)

(a) the LANDLORD may give immediate notice that the TENANT is to vacate the premises in the following circumstances:

(i) if the premises have been totally destroyed or damaged to such an extent as to be unsafe, or are unfit for human habitation;

(ii) if the TENANT causes malicious damage to the premises or endangers the safety of the premises; or

(iii) if the TENANT is in arrears of rent of 15 days or more.

(b) the TENANT may give immediate notice of vacation of the premises if the premises have been totally destroyed or damaged to an extent as to be unsafe or unfit for human habitation.

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9.2 In the case of a fixed term agreement
(a) the LANDLORD may give:
(i) 14 days notice in writing where the TENANT fails to comply with the terms of the agreement;
(ii) 60 days notice in writing where posession of the premises is required for demolition or substantial repair , which cannot be carried out practicably without vacant posession;
(b) the TENANT may give:
(i) 14 days notice in writing where the LANDLORD fails to comply with the terms of the agreement;

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9.3 In the case of weekly, fortnightly or monthly agreement.
(a) the LANDLORD may give:
(i) 14 days notice in writing where the TENANT fails to comply with the terms of the agreement.
(ii) 60 days notice in writing where the LANDLORD requires posession of the premises for the purposes of demolition, substantial repairs, renovation or reconstruction which cannot be carried out practicably without vacant posession; for his own occupation or for a member of his immediate family or for sale.
(iii) 6 months notice in writing in any other case.
(b) the TENANT may give:
(i) 14 days notice in writing where the LANDLORD fails to comply with the terms of the agreement
(ii) one months notice in any other case.

9.4 In the case of a Fixed Term Agreement:
(a) where the tenancy continues after the date of expiry the tenancy shall become a weekly, fortnightly or monthly tenancy depending on the interval of payment of the rent in accordance with clause 1.2 (a) (i) unless and until a further fixed term agreement is entered into between the LANDLORD and the TENANT.
(b) All the provisions of Clause 9.2 shall apply to the tenancy so created.

10. MISCELLANEOUS

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10.1 In any case where the LANDLORD gives the TENANT notice to terminate the tenancy and the TENANT remains on the premises after the day set for vacation, the LANDLORD may apply to the Court of Requests (Small Claims Division) for an order of posession and s/he shall not seek to gain posession of the premises in any other way.

10.2 The tenancy agreement shall specify those services for which the TENANT is responsible (e.g. electricity, water, gas),together with any other charges (e.g. insurance) and also specify those charges for which the LANDLORD is responsible (e.g. rates, taxes, property insurance) unless otherwise agreed between the parties.

rvices to be
perately metered

10.3 All services supplied to the premises shall be seperately metered unless otherwise agreed by the parties.

10.4 The LANDLORD may incorporate any other terms or conditions into the agreement as s/he sees fit, but such terms or conditions shallnot in any way derogate from any of the terms expressed in this part.

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10.5 The LANDLORD or his/her AGENT shall not tamper with the electricity, water, gas or any other services to the premises and shall not seek to remove any chattels form the premises referred to in the agreement.

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be given

10.6 Any notice referred to in this agreement shall be duly given if:
(a) in the case of the TENANT, left at the premises;
(b) in the case of the LANDLORD left at his/her last known address or the address of his/her AGENT.

11. DISPUTE RESOLUTION

11.1 All disputes arising out of this agreement may be dealt with by the Court of Requests (Small Claims Division) and no proceedings in relation to any such dispute shall be initiated in any other court or tribunal.

11.2 The Court of Requests (Small Claims Division) shall be notified of a dispute by the lodging of a claim by the aggreived party against the other party in accordance with the procedures of the Court of Requests (Small Claims Division).

AMENDMENTS TO COURT OF REQUESTS (SMALL CLAIMS DIVISION) ACT 1985

[AN ACT to extend the jurisdiction of the small claims division to enable the Special Commissioner to determine claims arising out of residential tenancy agrements and matters incidental thereto.]

I NEW DEFINITIONS

(1) Delete from definition of 'small claim' sub para (a) (i) the words "including a claim ... for residential purposes", and inserting a new para (c) a claim arising out of a residential tenancy agreement".

(2) "residential tenancy agreement" to be defined as "an agreement to lease for a fixed term, or otherwise let, premises for residential purposes".

(3) "tenant" to be defined a "a person to whom any premises are let for residential purposes".

(4) "landlord" to be defined as "a person who lets any premises for residential purposes".

(5) "security deposit" to be defined as "a sum of money paid to the landlord by the tenant in relation to a residential tenancy agreement as security for damage to the premises by the tenant, arrears of rent or any other loss or expense incurred by the landlord arising out of the residential tenancy agreement".

II REFERENCE OF EVICTION PROCEEDINGS FROM THE SUPREME COURT TO THE SMALL CLAIMS DIVISION

Insert a new section 15A

15A(1) Where, in the Supreme Court of Tasmania:-

(a) a person makes an application for the eviction of a tenant, and

(b) an appearance to that application is filed with the Registrar of the Supreme Court, or the District Registrar

the Registrar, or District Registrar shall, if an election to do so, made in writing, is filed with the Registrar, or District Registrar, within 14 days after an appearance is filed as aforesaid, cause the application to be referred to the Registrar of the Court of Requests.

(2) Upon reference of the application to the Registrar of the Court of Requests, he shall cause the application to be referred to the Special Commissioner to be heard and determined as a small claim.

III PROVISION FOR THE DEPOSIT OF A SECURITY DEPOSIT WITH THE COURT

(1) Insert a new sub-section 17(1A)

"(1A) Where a claim form filed in the office of a Registrar, pursuant to section 15, or a small claim referred, pursuant to section 15A, to a division to a court of requests related to a residential tenancy agreement, in relation to which a security deposit has been paid, the Special Commissioner may, at any time after the claim form is filed or the small claim is so referred, require the claimant or respondent to deposit with the Registrar of the relevant referred court-

(a) the amount of the security deposit, in full or in part

(b) such other amount as is determined by the Special Commissioner."

(2) Amend sub-section (2) by inserting after "under sub-section (1)" the words "or sub-section (1A)"

IV PROVISION FOR SPECIAL COMMISSION TO MAKE ORDERS IN RELATION TO A RESIDENTIAL TENANCY AGREEMENT

Insert a new Section 30A

"30A(1) Subject to Section 17(6),where the Special Commissioner does not make an order under sub-section(1) or a consent order under sub-section (2) in respect of a proceeding, he may in relation to a claim arising out of a residential tenancy agreement, make one or more of the following orders:-

(a) an order that the tenant quit the premises on or before a specified date;

(b) an order that the tenant be relieved from any term or terms of a notice to quit;

(c) an order requiring the landlord to have repaired by a competent person any defect in or about the premises at her/his expense on or before a specified date;

(d) an order requiring the tenant to have repaired by a competent person any damage wilfully done to the premises by the tenant at her/his expense on or before a specified date;

(e) an order requiring the landlord to return to the tenant the security deposit, in full or in part;

(f) an order requiring the tenant to forfiet to the landlord the security deposit, in full or in part;

(g) an order that the tenant pay to the landlord any rent owing under a residential tenancy agreement, or any other sum arising out of such agreement;

(h) an order that the landlord not enter or remain on the premises, subject to such exceptions or considerations as the Special Commissioner determines;

(i) an order that the landlord be able to enter the premises for such purpose or purposes, and on such conditions, as the Special Commissioner shall determine;

(j) an order that any term or condition of the terms and conditions be varied or deleted;

(k) any other order the Special Commissioner considers necessary to restrain any action in breach of a residential tenancy agreement, or requiring the performance of any term or condition of such agreement.

(2) Where an order is made under para (1)(a) the order shall be enforceable in the Court of Requests as provided by the Local Courts Act 1896.

(3) Where an order is made under para(1)(c) or (1)(d) the order may provide that, in default of compliance with the terms of such an order, the party in whose favour the order was made may have the repairs carried out by a competent person at the other party's expense, and such other provisions as are required to give effect to the order, including an order that any money owed to the other party, including any rental payment or payments to be paid into the Registrar to satisfy the expense of carrying such repairs.

(4) Where an order is made under para (1)(h) or (1)(i), and the Special Commissioner finds that a party is in breach of the order or any of the conditions of the order, the Special Commissioner may determine a sum to be paid to the party in whose favour the order was made in compensation for any loss, expense, injury or annoyance caused by such breach.

(5) [AS IN SUB-SECTION 30(7)] i.e. "Where an order is made under para (1)(c), (1)(e), (1)(f) or sub-section (ii) for the payment of a sum of money (including the whole or part of a security deposit)....."

V CONSEQUENTIAL AMENDMENTS TO SECTION 31

(1) Amend sub-section (1) to read "On making an order under Section 30 or 30A ....."

(2) Amend sub-section (3) to read "Where, pursuant .... an order under section 30(3)(c), 30A(1)(c) or 30A(1)(d) operates ...."

(3) Amend sub-section to add the words "or an extension of time where a time for compliance has been specified".

NOTES ON THE INTERPRETATION OF THE RESIDENTIAL TENANCIES AGREEMENT

1. RENT

1.1 Para (a) is self-explanatory. Section (b) raises the question whether the common law principle of a "clear" period of notice applies. This is clearly not the case with (i) because 60 days is not a multiple of 7 which may imply that it doesn't in relation to the 14 and 7 day periods specified in (ii) and (iii). It is not worth arguing in relation to (i), but, assuming the common law still applies, it could be used as a bargaining lever in relation to (ii) and (iii) to delay a rent increase.

1.2 Para (a) (i) would refer back to Clause 2 of the Rental Tenancies Agreement (RTA). Section (a) (ii) may have little practical effect because of Para 2.3 (a) (ii) (a) which includes "any unpaid debts upon the rental property incurred by the tenant" as a ground for withholding the bond (or part thereof) though probably not intended for this purpose. Tenants should be cautioned against making statements to the landlord that rent arrears "can be taken out of the bond". In certain situations, where the sum held is 4 weeks rent and the tenancy period is in excess of 14 days [see Para 9.3 (b) (i)] it might mean early notice because of non-compliance. Landlords and tenants can, of course, agree to do this under Para 2.3 (ii) (b).

2. SECURITY DEPOSIT/BOND MONEY

2.1 Self explanatory, though rather high upper limit. (Law Reform Commission recommended 3 weeks).

2.2 (Printing error here - 2.1) Again self-explanatory but tenant could persuade landlord to specify the institution and/or minimum interest in Clause 6 of RTA.

2.3 There may be a (hopefully hair-splitting) loophole here. There is a suggestion in the wording that where the landlord is entitled to withhold part (or all) of the bond the 14 day period does not apply. There is regrettably also no clear direction to the landlord that it is up to her/him to justify the withholding of the bond for any of the grounds specified (i.e. production of receipts, accounts etc.). Also it is predicted that on the basis of the wording in item 3 of the list under (ii) (a) that landlords will continue to (unlawfully) claim for routine cleaning costs. The use of the word "loss" (in "satisfy any loss resulting from") is totally unhelpful in this context. Does failure to keep premises clean result in a "loss" where no other damage is caused as a result (which would rarely be the case), and there is no legal obligation on the tenant to pay in any case? (But see 6.1) As to 2.3 (a) (ii) (b) in the case of a dispute the landlord's position might be shaky unless the agreement was in writing.

3. CONDITION REPORT

3.1 The inclusion of the Condition Report (CR) is a very good idea, and so is the requirement here that the onus is on the landlord to prepare the report and provide the tenant with a copy. There is a possible trap though which is outlined under 3.2.

3.2 This procedure must be strictly followed if it is to be a protection for tenants caught up in the all too common dispute about whether the

"damage" was there at the beginning of the tenancy or not. There is a risk that some tenants, either out of laziness, carelessness or because they feel intimidated, may not go through the CR in detail and merely sign on page 13. The fact that all the notations in the report were self-serving and there is no notation on individual pages would, of course, not help the landlord if there was some later dispute about its contents. If the tenant, on receiving a copy, finds that the CR is not accurate, the tenant should either write to the landlord and specify what is wrong, and/or go through the premises with a "responsible person" and make initialled alterations (by both) on the copy which both the tenant and that person should sign and date on p.13. This copy should also be used as the basis for the checking procedure in (a) rather than the landlord's copy and it should be explained that that copy was inaccurate.

3.3 (Shown as 3.4 - another printing error). This section specifies that the CR signed by both parties will be the basis for determining what damage has been done for the purposes of 2.3. This dispute would go to the Consumer Affairs Council (CAC) and through to the Small Claims Division (SCD) under paras 11.1 and 11.2. Let's hope those two bodies would be flexible about the use of the amended copy of the CR if appropriate.

4. USE OF PREMISES

4.1 The implications of sub-para (b) are referred to under 5.2 and 9.4 as well as 8.

4.2 (a) "Illegal" relates only to the use of the premises (e.g. prostitution, storing explosives or inflammable substances). It would not include "illegal" acts such as having sex with an under age girl or storing stolen goods unless, possibly, if these were ongoing activities.
(b) & (c) "Nuisance" is a technical term meaning "serious or considerable annoyance, inconvenience or danger to the public". So this would not apply to trivial annoyances.
(d) Self-explanatory. This is to prevent possible breaches of the zoning laws.

5. LOCKS

5.1 This is a welcome inclusion except that sub-para (c) with its reference to para 9 could easily be construed as an invitation to use this all too popular form of "self-help" where the required period of notice expires under para 9. This is a serious defect, especially since there is no definite statement that "self-help" is not to be used. (Also see 9.3 and 10.4). Lock-outs should have been banned.

5.2 It may be argued that the landlord should have the keys to enable entry, and that landlords as a matter of practice do keep the keys. However, unfortunately this para may be construed by landlords as giving them an "equal right" to enter even though this would clearly be against the intent of 4.1 (b) and 8.1.

6. CLEANLINESS, REPAIRS, MAINTENANCE

6.1 Sub-para (a) only requires the premises to be "reasonably" clean. This would imply that if the premises are reasonably clean when the tenant leaves them no "loss" could result to the landlord. Sub-para (b) is very welcome. The question is what is "good repair"? It would at

least include those things listed under 6.2 (d). The list of requirements under the regulations to the Substandard Housing Control Act might be used as a guide. The notification under sub-para (c) would refer to 6.2 (c). If repairs were not done in the 14 day period it appears that the dispute would have to be taken to the SCD (see paras 11.3 and 11.4). The SCD has the power to order works to be done. The CAC doesn't appear to have any "jurisdiction" as it has with bonds.

6.2 "Reasonably clean" in sub-para (a) does not mean than everything must be scrubbed, polished and steam-cleaned unless it is warranted in the particular case. A vacuuming, dusting and wiping may be perfectly adequate. Avoiding damaging the premises [sub-para (b)] does not make the tenant responsible for damage by third parties. (This should be reported to the landlord and will usually be covered by her/his insurance). The notification in writing required by sub-para (c) raises the question whether the tenant may not be responsible for any damage which results from failure to report (e.g. a leaking roof). (Tenants may be liable under common law anyway). Reasonable steps to contact a landlord about urgent repairs in sub-para (d) would in most cases be the making of phone calls to the agent or landlord. Any failure by the landlord to recompense should be taken to the SCD.

7. RENOVATIONS, ALTERATIONS

Self-explanatory, but should the situation arise where the tenant wants to be recompensed for improvements (e.g. carpets) the tenant must get this in writing from the landlord at the time of installation. Fixtures which are not removed automatically belong to the landlord and, in fact, there is even doubt whether there is a "right of removal" in common law.

8. RIGHT OF ENTRY

This para clearly restricts the landlord's right of entry to specified times and for specified reasons. Any entry not justified by this paragraph would be a breach of 4.1 (b) and therefore grounds for early notice under sub-para 9.4 (b). If the landlord wanted to rely on the tenant's "express permission" under sub-para (a) s/he would best get that in writing in case of argument. "Reasonable notice" is not defined, but any notice which would cause significant inconvenience to the tenant (who should say so) would not be "reasonable". The grounds under sub-para (b) (iii) are rather widely drawn given that it leaves tenants at the mercy of what a landlord may consider to be a "nuisance" and her/his standards of cleanliness, especially since the tenant hasn't any effective remedy to stop unwarranted entry. However, reasonable notice is still required and a tenant should insist on knowing at that stage why a landlord wishes to visit so there is no room for retrospective justification.

9. TERMINATION OF THE TENANCY AGREEMENT

9.1 This suggests that a lease for a fixed term will still be a binding term on both the parties, but also that there will be particular situations where it won't be binding.

9.2 This spells out that leases may be terminated (presumably early) by either of the parties if any of the conditions in 9.3 or 9.4 are met. In other words this is a definite departure from the existing law where neither of the parties can legally end a lease before the term is up except if a breach of the lease can be shown.

9.3 This sets out the grounds on which a landlord may alternatively give immediate or prospective notice. The onus is on the landlord to show that a valid ground exists (except in the case of sub-para (b) (iii) - 6 months notice) and should state this in the notice to quit.

(a) (i) the wording of this sub-paragraph suggests that there may be two separate grounds i.e. "unsafe" and "unfit". If this is the case there is the question of how the 2nd ground ties in with the scheme of the Substandard Housing Control Act 1973 (Section 3). This is a serious problem because the lease suggests that a landlord can evict immediately where the "premises become unfit for human habitation" while the scheme of the Act is to force the landlord to repair while protecting the tenant's tenancy. A tenant who is given notice by a landlord seeking to rely on the technical definition of the Act (i.e. where the house is still habitable but in bad repair) should immediately get in touch with the Substandard Housing Section and refuse to move. If the premises are already "substandard" (under the Act) the tenant cannot legally be evicted without a court order.

(a) (ii) "malicious damage" means "wilful" or "deliberate" damage (i.e. "wrecking the place"). It doesn't mean the accidentally broken window or burn in the carpet.

(a) (iii) The meaning of this sub-para is self-evident.

The main concern is that landlords will use these provisions, especially the immediate notice provision, in combination with "self-help" (i.e. throwing the tenant onto the street) as the unfortunate wording of sub-para 5.1 (c) might encourage.

As to sub-para (b), it isn't very clearly drafted but it appears to mean that (i), (ii) and (iii) all apply to a 6 month plus agreement, only (i) and (ii) apply to a 60 days plus agreement, and only (i) to a 14 days plus agreement. (In other words there is no protection at all to people on 7 or 14 day agreements).

Two examples illustrate how it is probably meant to work.

A: Where there is a 3 month agreement a tenant can be given 14 days notice if the agreement is broken and 60 days notice if the landlord wants the premises for any of the reasons in sub-para (b) (ii).

B: Where there is a 12 month agreement a tenant can be given 14 days notice if the agreement is broken, 60 days notice if the landlord wants the premises for any of the reasons in sub-para (b) (ii), or 6 months if s/he has no particular reason.

Again the same problems arise as to whether a "clear" period of notice applies (See 1.1). Also there is no provision for what happens to the tenancy once the fixed term expires. Presumably if the tenant stays with the consent of the landlord the tenancy will be a "periodic" one with the rental period determining the period of notice as is the law at present.

Where a tenant refuses to leave on expiry of the notice to quit the landlord's options are as they were under existing law. S/he can try to use "self-help" or go through the Supreme Court to file a writ for possession. The only procedural difference is that para 11.4 provides that the dispute shall be dealt with by the SCD under the Arbitration Act (See 11.4).

9.4 This para is pretty straightforward. The problem noted in sub-para 9.3 (a) (i) is probably avoided by the wording of (a) (i) here which appears to relate "unfitness" to the destruction of the premises so that it isn't an independent ground. (Probably this was the intention in 9.3 (a) (i) as well). Where 14 days notice is given it would be

best to give a clear period, and also state the reason (e.g. failure to repair the stove within 14 days, failure to give the keys to the new lock). In the case of 60 days no reason need be given and the clear notice principle probably doesn't apply (See 1.1) The usual rules apply to 7 day or 14 day tenancies.

10. MISCELLANEOUS

10.1 This paragraph originally provided for landlords to apply to the SCD for an "order of possession". The SCD has no jurisdiction to do this so it has been deleted. This means the procedure in 11.4 will have to be used.

10.2 This makes it mandatory to complete Clause 4 of the RTA. (Let's hope everybody becomes aware of this.)

10.3 This para is a very good idea. Again the landlord might be on shaky ground if he didn't have it in writing that the tenant agreed to joint metering. It could be a ground for early termination if the landlord refused to do so. This request should be made in writing.

10.4 This is a valiant attempt to impose the Terms and Conditions as a whole on the parties, and making any additional terms and conditions which might be inserted via Clause 6 of the RTA (Part I) invalid if they conflicted with Part II. The trouble is there is nothing whatsoever to stop the parties deleting 10.4 which means they could delete or vary anything else. (i.e. The lease collapses like a pack of cards.) Only legislation can cure this basic flaw.

11. COMPLAINTS/DISPUTE RESOLUTION

11.1 This appears to be another example of unclear drafting. It gives the CAC the power to deal with bond disputes but that is all. Should "and" have read "or" to enable the CAC to deal with other fairly frequent causes of dispute such as damage and rent arrears claims by landlords not covered by bond sums? Who knows? It appears these must go directly to the SCD via paras 11.3 or 11.4 (where sum claimed exceeds $2,000).

11.2 A two stage dispute resolution mechanism. One concern is that this will not mean inordinate delays where bonds are in dispute. Landlords can already hang onto bonds for 14 days (perhaps longer - see 2.3).

11.3 The SCD cannot deal with eviction proceedings without going through the Arbitration Act process (see 11.4). But it can make orders to carry out works which may be handy for enforcing the landlord's obligation to repair, and the landlord's duty to recompense for "urgent repairs" (see 6.2). It could also determine whether accounts which either party may give to each other in the course of/at the end of the tenancy are payable. It is a pity that 11.3 does not make clear that disputes involving in excess of $2,000 could be dealt with via para 11.4.

11.4 In this para the parties agree that any dispute which can't be dealt with by the SCD as such will be dealt with by the Special Commissioner of the SCD sitting as a referee under the Arbitration Act. The procedure is not all that different from making a claim under the SCD Act. Either party can write to the SCD saying there is a dispute about say, "the determination of a Rental Tenancy Agreement" or "damages exceeding the sum of $2,000", and say they rely on para 11.4 of the (RTA)" and wish to have the matter arbitrated. The Special

APPENDIX 5

Private Rental Sector Tables

Table I — Housing Tenure in Tasmania (by household) 1921 - 1986. Source: A.B.S. Statistical Reports.

Table II — Percentage Variation in Housing Tenure in Tasmania (by households) 1921 - 1986. [Derived from Table I].

Table III — The Incidence of Poverty, After Paying for Housing, by Tenure and family Type, 1981/82. Source: Social Security Review Paper No. 18, p.7.

Table IV — Poverty Measures after housing costs. Source: Commission of Inquiry into Poverty. (First main report, 1975).

Table V — Percentage of Income Paid in Average Weekly Rents in the Private Sector - Hobart, July - August 1989. Source: Housing Assistance Service. Shelter (National Housing Action).

Table VI — Distribution of privately rented dwellings throughout Tasmania, in the last census year 1986. Source: A.B.S.

TABLE 1: HOUSING TENURE IN TASMANIA (BY HOUSEHOLD) 1921 - 1986*

Census Year	Total Dwellings	Owned	Being Purchased	Owners Purchasers Undefined	RENTED				OTHER	
					Housing Dept	Govt.	Private	Not Stated	Other	Not Stated
1921	48,766	16,851	8,698			19,037(2)			4,180	
1933	48,479	20,266	3,975			20,165(2)			4,073	
1947	53,237	26,686	3,882			19,992(2)			2,677	
1954	70,715	36,910	9,540		2,871		19,128		2,266	
1961	85,639	41,161	18,820		3,230		20,466		1,962	
1966	98,282	68,368(1)			5,177		21,915		2,061	766
1971	109,602	73,267(1)			6,946		23,637		5,747	
1976	121,823	38,852		474	6,298		23,340		6,814	2,096
1981	135,598	44,740		3,188	9,552	2,137	21,762	458	5,506	3,278
1986	148,800	58,157	47,588		12,213	2,176	22,359	1,014	4,649	1,058

Notes: (1) In the census for 1966 and 1971, no distinction is made between dwellings which were owned outright and those which were being purchased

(2) In the census for 1921, 1933 and 1947, there is no category breakdown of rented dwellings. It is likely that most of these dwellings are in the rental sector, as housing authority tenancies were not created until the end of World War II

*Source: ABS, Statistical Reports 1921 - 1986.

TABLE II HOUSING TENURE IN TASMANIA (PERCENTAGE VARIATION) 1921 - 1986*

Census Year	Owned	Being Purchased	Owners Purchasers Undefined	RENTED				OTHER		Percentage Totals
				Housing Dept	Govt	Private	Not Stated	Other	Not Stated	
1921	34 6	17 8			39 0[2]			8 6		100
1933	41 8	8.2			41 6[2]			8 4		100
1947	50 1	7 3			37 6[2]			5 0		100
1954	52.2	13 5		4.1		27 0		3.2		100
1961	48.1	22 0		3 8		23.9		2.2		100
1966	69 6[1]			5 3		22.3		2.1	0 8	100
1971	66.8[1]			6 3		21.6		5.3		100
1976	31 9	36 1	0 4	5 2		19 2		5 6	1 7	100
1981	33 0	33 2	2 4	7 0	1 6	16 0	0 3	4 1	2 4	100
1986	39.1	32 0		8 2	1 5	15 1	0 7	3.1	1 1	100

Notes: (1) In the census for 1966 and 1971 no distinction is made between dwellings which were owned outright and those which were being purchased.

(2) In the census for 1921 1933 and 1947 there is no category breakdown of rented dwellings It is likely that most of these dwellings are in the rental sector, as housing authority tenancies were not created until the end of World War II

*Source: ABS, Statistical Reports 1921 - 1986

APPENDIX 5

TABLE ONE: THE INCIDENCE OF POVERTY, AFTER PAYING FOR HOUSING, BY TENURE AND FAMILY TYPE, 1981/82.

Household Type	Owner %	Purchaser %	Private Tenant %	Public Tenant %	All tenure types %
Couple, no dependants					
head < 65 yrs	4.7	4.0	6.7	3.2*	4.7
head ≥ 65 yrs	2.8	6.3*	23.0	7.9*	3.9
Couple with dependants	9.0	11.1	21.8	21.3	12.2
Single Parents	12.5	33.7	61.7	47.3	40.8
Single Person					
aged 15 - 24	12.3*	17.9*	20.5	17.6*	20.6
aged 25 - 64	7.9	7.8	18.6	15.3*	12.8
aged ≥ 65	1.9	14.7*	25.9	2.8*	5.2
All Households	5.4	9.8	21.4	18.8	11.2

The incidence shown is the proportion of all income units in each family type/occupancy type cell who were in poverty after paying for their housing.

* indicates estimates subject to greater than 25% relative standard error.

Source: Social Security Review, Paper No. 18, p.7

The skewed distribution of housing poverty across tenure reflects, at least in part, the distribution of housing subsidies.

APPENDIX 5

POVERTY MEASURED AFTER HOUSING COSTS

The incidence of poverty by tenure in 1972-73 and in 1981-82 among all income units, comparison of estimates.

Tenure	Incidence of poverty among all income units		
	1972-73 Actual	1981-82 Estimate of this Report	1981-82 Published in Bradbury, Rossiter & Vipond (1986, p.4)
Owner	3.7	4.00	5.30
Purchaser	4.0	4.82	9.10
Private Renter	12.8	16.49	20.90
Housing Authority Tenant	9.8	14.82	18.70
Rent Free	n.a	9.73	n.a.
All Tenures	6.7	8.30	10.70

Main Findings

1. The estimates of after-housing poverty in 1981-82 included in this report are lower than other published data, including those in Bradbury, Rossiter and Vipond, 1986. In this report, the level of after-housing poverty among people in all poverty is 8.30 per cent, compared with 10.70 per cent in the earlier publication.

2. The three reasons for the changes in the estimates of poverty have been described in the previous section. They are: that the revisions in the national accounts have led to a lower poverty line; that a wider definition of self-employment has been used and so more people have been excluded; and there has been a new method of calculating tax payments. Poverty is measured according to incomes net of tax.

3. It is impossible to calculate the exact effect of each change. It is likely, however, that the higher level of poverty among owners and purchasers in Bradbury, Rossiter and Vipond is due to the greater number of self employed people included in their estimates. The lower level of after-housing poverty found among tenants in both private and public section dwellings may be linked to the reduction in the poverty line. People in these sectors seem to be clustered around the after-housing poverty line since, as will be shown, a reduction in housing outlays markedly reduces their incidence of poverty.

Adult Income Units by Type of Occupancy: Numbers and Percentages of all Units and of Very Poor Units (Before and After Housing Costs) with Particular Occupancy.

Type of Occupancy	All Adult Income Units ('000)	%	Units very poor before housing costs ('000)	%	Units very poor after housing costs ('000)	%
Full ownership	1026	26.2	157	39.3	35	14.5
Buying	1139	29.1	34	8.5	45	17.2
Renting from Housing Commission	183	4.7	26	6.5	18	6.9
Renting privately	839	21.4	86	21.6	107	40.8
Rent-free	126	3.2	31	7.8	10	3.8
Paying board	378	9.7	18	4.5	18	6.9
Board-free	225	5.7	47	11.8	26	9.9
TOTAL	3917	100.0	399	100.0	262	100.0

Source: Commission of Inquiry into Poverty (First Main Report, Prof. R.F. Henderson, Chairman), Poverty in Australia, AGPS, Canberra, 1975, p.160.

APPENDIX 5
DISTRIBUTION OF PRIVATE RENTAL HOUSING STOCK IN TASMANIA (1986)

NATURE OF OCCUPANCY OF PRIVATE DWELLINGS (a)

Area	Occupied dwellings							Unoccupied dwellings	Total private dwellings
	Owned	Being purchased	Rented		Other inc. inadequately described	Not stated	Total occupied		
			Housing authority	Other landlord					
Bothwell	122	30	3	68	34	4	261	945	1 206
Brighton	477	846	1 692	150	65	26	3 256	154	3 410
Bruny	102	29	--	25	22	6	184	384	568
Clarence	4 602	6 835	1 829	1 144	330	103	14 843	1 001	15 844
Esperance	604	220	25	162	49	19	1 079	409	1 488
Glamorgan	301	114	1	119	49	23	607	625	1 232
Glenorchy	5 170	5 633	1 519	1 870	342	81	14 615	716	15 331
Green Ponds	178	121	9	36	23	1	368	31	399
Hamilton	299	63	1	337	51	26	777	238	1 015
Hobart	6 868	4 733	572	5 336	481	332	18 322	1 504	19 826
Huon	820	464	23	268	78	10	1 663	118	1 781
Kingborough	2 481	3 051	193	739	161	55	6 680	532	7 212
New Norfolk	1 151	828	271	568	111	31	2 960	259	3 219
Oatlands	390	82	12	133	62	6	685	157	842
Port Cygnet	461	248	25	115	37	16	902	366	1 268
Richmond	338	211	5	80	52	16	702	92	794
Sorell	1 046	905	14	268	106	29	2 368	1 548	3 916
Spring Bay	304	163	22	138	28	12	667	425	1 092
Tasman	294	91	5	83	26	12	511	669	1 180
GREATER HOBART - SOUTHERN REGION	26 008	24 667	6 221	11 639	2 107	808	71 450	10 173	81 623
Beaconsfield	2 468	1 888	32	593	147	49	5 177	817	5 994
Campbell Town	222	91	31	106	46	4	500	140	640
Deloraine	933	379	38	269	118	36	1 773	306	2 079
Evandale	294	229	3	111	50	9	696	81	777
Fingal	494	145	27	204	67	31	968	275	1 243
Flinders	159	49	9	101	31	9	358	113	471
George Town	552	665	605	307	52	22	2 203	555	2 758
Launceston	8 567	6 562	2 147	3 777	564	200	21 817	1 503	23 320
Longford	946	598	81	366	81	27	2 099	180	2 279
Portland	541	217	9	173	59	36	1 035	905	1 940
Ringarooma	434	134	11	112	44	11	746	199	945
Ross	84	16	2	50	17	1	170	79	249
Scottsdale	735	407	82	275	68	15	1 582	357	1 939
Westbury	1 168	875	21	422	88	18	2 592	219	2 811
NORTHERN REGION	17 597	12 255	3 097	6 866	1 432	469	41 716	5 729	47 445
Burnie	2 466	2 339	916	972	142	68	6 903	464	7 367
Circular Head	1 239	612	114	384	132	26	2 507	545	3 052
Devonport	3 329	2 823	844	1 072	222	57	8 347	670	9 017
Kentish	739	366	43	210	49	19	1 426	142	1 568
King Island	270	128	15	217	54	10	694	197	891
Latrobe	983	594	99	258	81	17	2 032	371	2 403
Lyell	517	139	36	431	50	47	1 220	130	1 350
Penguin	812	607	78	171	57	26	1 751	164	1 915
Strahan	119	23	—	26	10	10	188	121	309
Ulverstone	2 047	1 479	436	506	143	42	4 653	369	5 022
Waratah	43	6	3	401	16	10	479	151	630
Wynyard	1 807	1 303	295	504	122	36	4 067	611	4 678
Zeehan	179	247	16	878	32	13	1 365	291	1 656
MERSEY-LYELL REGION	14 550	10 666	2 895	6 030	1 110	381	35 632	4 226	39 858
Off-shore areas and migratory	2	—	—	—	—	—	2	—	2
TASMANIA	58 157	47 588	12 213	24 535	4 649	1 658	148 800	20 128	168 928
STATISTICAL DIVISIONS and Subdivisions									
GREATER HOBART	20 710	22 096	6 089	9 653	1 474	618	60 640	5 148	65 788
SOUTHERN	5 298	2 571	132	1 986	633	190	10 810	5 025	15 835
Greater Launceston	12 079	9 856	2 875	4 997	784	272	30 863	2 616	33 479
Central North	2 849	1 340	52	848	316	89	5 494	1 045	6 539
North-Eastern	2 669	1 059	170	1 021	332	108	5 359	2 068	7 427
NORTHERN	17 597	12 255	3 097	6 866	1 432	469	41 716	5 729	47 445
Burnie-Devonport	10 139	8 399	2 663	3 227	643	221	25 292	2 435	27 727
North-Western Rural	3 553	1 852	177	1 067	359	80	7 088	1 098	8 186
Western	858	415	55	1 736	108	80	3 252	693	3 945
MERSEY-LYELL	14 550	10 666	2 895	6 030	1 110	381	35 632	4 226	39 858
Off-shore areas and migratory	2	—	—	—	—	—	2	—	2
TASMANIA	58 157	47 588	12 213	24 535	4 649	1 658	148 800	20 128	168 928

(a) Excludes caravans, etc. in caravan parks

Source: A.B.S.

APPENDIX 5

PERCENTAGE OF INCOME PAID IN AVERAGE WEEKLY VACANT RENTS IN THE PRIVATE SECTOR- HOBART, July-August, 1989.

Pension, Benefit, Allowance.	Weekly Income.	Bedsitter	1 Bed. flat	2 Bed flat	3 Bed. house	Room in share house
Average Rent per Week		$58	$79	$110	$144	$48
Search Allowance						
›ung Homeless .owance.	$81.40	71%	97%	135%	177%	59%
ıployment Benefit 18-20 years.	$97.70	59%	81%	113%	147%	49%
ıployment Benefit Single.	$120.65	48%	65%	91%	119%	40%
ıployment Benefit ›le & 2 child.U.13.	$263.40	25%	30%	42%	55%	18%
›orting Parent& Child. U. 13.	$177.20	33%	45%	62%	81%	27%
ed Pension ngle)	$129.20	45%	61%	85%	111%	37%
l Pension ›uple)	$215.40	27%	37%	51%	67%	22%
study (max. ind. te for 16-17yrs.)	$81.40	71%	97%	135%	177%	59%
study (max. ind. te for 18yrs.)	$97.70	59%	81%	112%	147%	49%
›erage Bonds		$207	$215	$317	$374	$112

* Average weekly vacant rents calculated from advertisements in 'To Let' columns of the Mercury, Wednesdays and Saturdays,

* All percentages taken to nearest %. All dollars, except Pension, Benefit, Allowance, taken to nearest $.

Source: Housing Assistance Service, Shelter (National Housing Action)

APPENDIX 5

PERCENTAGE OF INCOME PAID IN AVERAGE WEEKLY VACANT RENTS IN THE PRIVATE SECTOR- HOBART, JAN-FEB 1989

Pension, Benefit, Allowance.	Weekly Income.	Bedsitter	1 Bed. flat	2 Bed flat	3 Bed. house	Room in share house
(Average Cost per week)		$57.00	$76.00	$109.00	$140.00	$47.00
Search Allowance	$53.55	106%	142%	204%	261%	88%
oung Homeless lowance.	$81.40	70%	106%	134%	172%	58%
mployment Benefit 18-20 years.	$97.70	58%	78%	112%	143%	48%
mployment Benefit Single.	$116.00	49%	66%	94%	121%	41%
mployment Benefit ıple & 2 child.U.13.	$255.10	22%	30%	43%	55%	18%
pporting Parent& Child. U. 13.	$184.25	31%	41%	59%	76%	26%
ged Pension ngle)	$124.25	46%	61%	88%	113%	38%
ed Pension couple)	$207.10	28%	37%	53%	68%	23%
ıstudy (max. ind. ate for 16-17yrs.)	$81.40	70%	106%	134%	172%	58%
ıstudy (max. ind. ate for 18yrs.)	$97.70	58%	78%	112%	143%	48%
(Average Bonds)		$207.00	$208.00	$305.00	$337.00	$112.00

* Average weekly vacant rents calculated from advertisements in 'To Let' columns of the Mercury, Wednesdays and Saturdays, January-February, 1989.

* All percentages taken to nearest %. All dollars, except Pension, Benefit, Allowance, taken to nearest $.

Source: Housing Assistance Service (Shelter, National Housing Action)

APPENDIX 6

Factors influencing Investor Behaviours.

IMPORTANCE OF FACTORS INFLUENCING INVESTMENT DECISIONS IN RESIDENTIAL RENTAL PROPERTY

	APPRAISAL BY LANDLORDS (1-3)						APPRAISAL BY REAL ESTATE AGENTS (4)				APPRAISAL BY INTENDING LANDLORDS (3)	
	ALL LANDLORDS		LANDLORDS WITH 1-10 UNITS		LANDLORDS WITH 11+ UNITS		SMALL LANDLORDS		LARGE LANDLORDS			
	RANKING ORDER	MEAN SCORE	RANKING ORDER	MEAN SCORE	RANKING ORDER	MEAN SCORE	RANKING ORDER	MEAN SCORE	RANKING ORDER	MEAN SCORE	RANKING ORDER	MEAN SCORE
Expected Capital Gains	1	1.94	1	1.97	=1	1.64	=2	1.97	2	1.46	1	1.64
Taxation Provisions Affecting Rental Property	2	2.12	2	2.15	=3	1.73	=2	1.97	1	1.38	2	1.68
Prevailing Prices of Rental Properties	3	2.24	3	2.26	=6	2.00	8	2.29	8	2.13	3	1.92
Present Level of Capital Gains	4	2.28	=4	2.32	5	1.82	6	2.19	=3	1.79	4	2.08
Current Rental Income	5	2.29	6	2.33	=1	1.64	1	1.84	6	1.92	6	2.52
Expected Rental Income	6	2.32	=4	2.32	9	2.27	=4	2.03	5	1.83	7	2.56
Maintenance Costs	7	2.57	7	2.62	=6	2.00	9	2.48	10	2.38	=9	2.76
Cost of Finance	8	2.61	8	2.63	=10	2.36	=4	2.03	7	2.0	5	2.20
Residential Tenancy Laws	9	2.73	9	2.81	=3	1.73	7	2.26	9	2.22	11	2.84
Land Tax	10	2.78	12	2.85	=6	2.00	13	3.23	12	2.67	13	3.12
Attractiveness of Alternative Investments	11	2.80	=10	2.83	=10	2.36	10	2.55	=3	1.79	8	2.59
Council & Service Rates	12	2.82	=10	2.83	13	2.73	11	3.0	13	2.92	14	3.16
Town Planning, Building & Health Controls	13	3.39	13	3.40	14	3.27	14	3.81	11	2.58	=9	2.76
Difficulty of Getting Finance	14	3.43	14	3.44	=10	3.36	12	3.03	14	3.04	12	3.00
NO. OF RESPONSES:	144		133		11		33		24		40	

IMPORTANCE SCORE CODE

1 Extremely Important
2 Very Important
3 Somewhat Important
4 Not Very Important
5 Not At All Important

Sources:
(1) Survey of Landlords by Study Team, September 1983
(2) Survey of Landlords by Monash University Law Students, September 1983
(3) Survey of Landlords and Intending Landlords attending RESI Property Management Course, July 1983
(4) Survey of Real Estate Agents by Study Team, July-September 1983